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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LATROBE STEEL COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petitioner, Latrobe Steel Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 5, 1981.

QUESTION PRESENTED

Is the desire of an employer or a labor organization to use a professional stenographer to make a verbatim record of collective bargaining negotiations a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d), or, to the contrary, is such desire subject to a per se rule of illegality under which the good faith of the parties is irrelevant?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (App. A, *infra*) is reported at 630 F.2d 171. The opinion of the Court of Appeals enforces in pertinent part the decision and order of the National Labor Relations Board (App. C, *infra*) which is reported at 244 N.L.R.B. No. 59.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 5, 1981, (App. B, *infra*). This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are Sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§158(a)(1), (a)(5) and (d). Sections 8(a)(1) and (5) state as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) of the Act states as follows in pertinent part (emphasis supplied):

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual

obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* . . .

STATEMENT OF THE CASE

On June 7, 1977, Latrobe Steel Company (the "Company")[1] and the United Steelworkers of America, AFL-CIO (the "Union") met to begin negotiating a new collective bargaining agreement. The Company's negotiator introduced professional stenographers from a firm which had been engaged at the Company's expense to make a verbatim record of the official negotiations. The Company did not seek agreement from the Union that the verbatim record would be binding on the Union. Nor did the Company object to the Union making its own record of negotiations. Nonetheless, the Union's negotiators objected to the presence of the professional stenographers and then the parties moved on to negotiating over

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1. Latrobe Steel Company is a wholly owned subsidiary of The Timken Company. Latrobe Steel Company has a minority financial interest in Acero Solar and Metales DeCalidad, two companies located in Mexico City, Mexico, and also in Acopalma, a company located in Belo Horizonte, Minas Gerais, Brazil. Neither Latrobe Steel Company nor The Timken Company have partly owned subsidiaries.

substantive matters. The professional stenographers made a verbatim record of that first bargaining session and of all subsequent sessions (forty-six meetings). The negotiations resulted in a new collective bargaining agreement.

The Union filed an unfair labor practice charge with the National Labor Relations Board ("Board") which alleged that the Company had violated Sections 8(a)(1) and 8(a)(5) of the Act by "[i]nsisting as a condition precedent to engaging in collective-bargaining negotiations on the presence of a professional stenographer to make verbatim transcripts of said negotiations . . . despite the Union's objection thereto." The Board's General Counsel issued a Complaint against the Company, charging the Company with having committed a per se violation of the Act, i.e., that the Company's insistence upon using the professional stenographer violated the Act without regard to the Company's good faith intent. The case was tried before an Administrative Law Judge ("ALJ"). To underscore his per se violation theory General Counsel stipulated at the hearing that the ALJ could not infer from the facts and circumstances of the case that the Company had acted in bad faith by seeking to use the professional stenographer to make a verbatim record of negotiations.

The Company's defense was based upon the fact that at the time of hearing and for at least thirty years prior thereto the Board and the courts had interpreted the Act as requiring good faith bargaining over procedural arrangements, including a party's desire to employ a professional stenographer to make a verbatim record of negotiations. The Company established that its intent was in good faith in that, *inter alia,* it wanted the pro-

fessional stenographer to take a verbatim record (i) for use in resolving disputes over the contract's meaning and intent in the grievance-arbitration procedure, (ii) for use by local plant management and corporate officials (who were located in a distant city) to keep abreast of bargaining, (iii) to allow its two negotiators to concentrate on bargaining rather than be diverted by tediously having to take copious notes and (iv) to allow the bargaining unit employees to follow the progress of negotiations, if they desired.

After the hearing concluded but before the ALJ issued a decision, the Board changed its longstanding interpretation of the Act that a party's desire to employ a professional stenographer to make a verbatim record of bargaining is a mandatory subject of bargaining. In *Bartlett-Collins Co.*, 237 N.L.R.B. 770 (1978), *enf'd, NLRB v. Bartlett-Collins Co.*, 106 LRRM 2272 (10th Cir. 1981), *petition for cert. filed*, No. 80-1662 (April 1, 1981), the Board stated that "[t]he question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase 'wages, hours and other terms and conditions of employment.' " The Board held in *Bartlett-Collins* that "the demand for the presence of a court reporter during negotiations as a device to record those negotiations is not a mandatory subject of bargaining, and that either party's insistence to impasse on this issue is accordingly, a violation of the Act, without regard to whether such insistence was in good or bad faith." 237 N.L.R.B. at 772. The ALJ then held in the instant case, citing the Board's *Bartlett-Collins* decision, that the Company had violated the Act (without regard to the Company's good faith) by insisting upon using the pro-

fessional stenographer to make a verbatim record. (App. C at 46a-49a). The Board issued an Order affirming the ALJ's decision. (App. C at 31a-33a).

The Third Circuit Court of Appeals enforced the Board's Order concerning the professional stenographer issue.[2] The Court of Appeals reasoned that good faith bargaining is only required under the Act when "wages, hours, and other terms and conditions of employment" are discussed. (App. A at 9a-10a). The Third Circuit held that anything not literally involving one of those topics, such as the instant matter, are "non-mandatory subjects of bargaining".

REASONS FOR GRANTING THE WRIT

This case raises the important federal labor law question of whether Section 8(d) should be interpreted to require good faith bargaining over procedures for negotiations. Specifically, may the Board prevent an employer or labor organization from insisting on engaging a professional stenographer to make a verbatim record of bargaining, where the employer or labor organization desires to use the record in good faith to communicate with the bargaining unit employees, management and other interested persons? The Board's attempt to force the parties to conform to the Board's idea of a right and wrong way to bargain has important repercussions to both employers and labor organizations given the

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2. The Third Circuit refused to enforce the Board's Order regarding certain other purported violations of the Act. (App. A at 16a-21a). This petition relates only to the professional stenographer issue.

amount and diversity of collective bargaining in this country.[3]

Underlying the question presented herein is the Congressional policy, clearly expressed in the legislative history of the Taft-Hartley amendments to the NLRA in 1947, that the Board was not to have discretion to "compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. §158(d) (part of the Taft-Hartley amendments). Rather, parties to collective bargaining were to be free, in both substantive and procedural areas, to settle their differences by bargaining in good faith. In this case, there was no question that the Company was acting in good faith, and that it was not seeking to use the professional stenographer to impede or interfere with bargaining. Yet the Board and Third Circuit decided that the Company had nonetheless committed a per se violation of the Act, contrary to the intent of Congress.

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3. In fiscal year 1979 alone, there were approximately 100,000 collective bargaining agreements negotiated by employers and labor organizations subject to the NLRA. See Federal Mediation and Conciliation Service, Thirty-Second Annual Report, Fiscal Year 1979 at 26-27. Although there is no published statistic showing how many of the 100,000 negotiations involved the use of a professional stenographer, the Board cited a survey to the Third Circuit wherein 10% of the companies surveyed reported that they take a verbatim record of negotiations. National Industrial Conference Board Inc., *Conference Board Reports: Preparing for Collective Bargaining* (1959) at p. 40. A further indication of the frequency with which the question presented can arise is the fact that there is another petition for writ of certiorari presently pending before the Court involving a similar issue. See, *Bartlett-Collins Co. v. N.L.R.B.*, No. 80-1662.

Moreover, contrary to the Third Circuit's approach, this Court has never interpreted the scope of Section 8(d) as encompassing only "wages, hours, and other terms and conditions of employment". Rather, the Court has made clear that Section 8(d) must be interpreted so as to promote the purpose of the Act—to encourage collective bargaining. E.g., *Fibreboard Corp. v. NLRB,* 379 U.S. 203 (1964); *Teamsters Union v. Oliver,* 358 U.S. 283 (1959). Where, as here, a matter promotes the purpose of the Act, it is a mandatory subject of bargaining even if it is not literally a wage, an hour, etc.

That the practice of having a professional stenographer make a verbatim record of negotiations does promote collective bargaining is evidenced by the fact that the Board had held for thirty years that procedural matters, including the instant practice, were mandatory subjects of bargaining. *E.g., St. Louis Typographical Union,* 149 N.L.R.B. 750 (1963); *Reed & Prince Mfg. Co.,* 96 N.L.R.B. 850 (1951), *enf'd as modified,* 205 F.2d 131 (1st Cir. 1953), *cert. denied,* 346 U.S. 887 (1953). Several courts of appeals have interpreted the Act in the same fashion, *e.g., NLRB v. Southern Transport, Inc.,* 355 F.2d 978 (8th Cir. 1966), *NLRB v. Reed & Prince Mfg. Co., supra,* in direct conflict with the Third Circuit's decision in this case.

The Company's desire to use a professional stenographer to make a verbatim record of bargaining did promote collective bargaining in this case. The Company wanted the verbatim record to communicate the negotiation proceedings to the bargaining unit employees, management and other interested persons. By preventing the Company from insisting upon allowing the professional stenographer to make the verbatim record, the

Third Circuit's decision prevents the Company from publishing the bargaining record, contrary to Section 8(c) of the Act which guarantees free speech. Since the Company's intended use of the verbatim record effectuated the purpose of the Act, the Third Circuit erred by not concluding that the request to use the professional stenographer to make the verbatim record was a mandatory subject of bargaining.

The Court should grant a writ of certiorari for any or all of the above reasons.

1. One of the principal policies underlying the enactment of the Taft-Hartley amendments to the Wagner Act in 1947 was Congress' desire to limit the Board's discretion in dictating the substance and procedure of collective bargaining. The House believed that under the Wagner Act the Board had too much discretion "in the guise of determining whether or not an employer had bargained in good faith, [to set] itself up as the judge of what concessions an employer must make and of the proposals and counterproposals he may or may not make." H.R. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 19.[4] Similar concern was expressed

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4. The House Report on H.R. 3020 indicated that the concern over the Board's discretion applied to procedural issues, as well as substantive matters:

> "Bargaining is a difficult and highly refined art, and employers and unions have many techniques for arriving at the bargains they wish to reach . . . Congress ought to assure to each side a full opportunity to use its bargaining abilities. It ought not to say how the parties may use their abilities. The Board has tried to do that, with unfair results." H.R. Rep. No. 245 at p. 21.

by the Senate. See S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 24.

The House passed H.R. 3020, which listed specific procedures[5] for collective bargaining as well as numerous substantive matters over which bargaining was required. H.R. 3020, 80th Cong., 1st Sess., §2(11)(A) and (B). The Senate bill, S. 1126, §8(d), provided for a more general definition of collective bargaining—"to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or the settlement of any question arising thereunder. . . ."—but the Senate made clear that its definition would limit Board discretion to force concessions because "the duty to bargain collectively does not require either party to agree to a particular demand or to make a concession." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 24.

When H.R. 3020 was referred to the Senate, the Senate amended the House bill to conform to S. 1126. The House later approved the Senate amendments. The House Conference Report on H.R. 3020 noted that while the Senate amendments did not list procedures to be followed in bargaining, the intent was *not* to allow the Board to force parties to conform to the Board's view of collective bargaining. Rather, parties to bargaining were to be free to resolve their differences by bargaining in good faith without the Board "determining the merits of the positions of the parties." H.R. Conf. Rep. No. 510 on H.R. 3020, p. 24.

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5. The procedures set forth in H.R. 3020 included a requirement to meet and discuss proposals and counterproposals at not less than four separate conferences held within thirty days of the party's initial conference. H.R. 3020, §2(11)(A).

After the passage of the Taft-Hartley amendments the Board followed this Congressional intent by allowing parties to collective bargaining to establish their own procedures by good faith bargaining. Regarding the instant question of insisting upon using a professional stenographer to make a verbatim record of bargaining proceedings the Board held in *St. Louis Typographical Union No. 8,* 149 N.L.R.B. 750, 752 (1964):

> "It is wholly consistent with the purposes of the Act that the parties be allowed to arrive at a resolution of their differences on preliminary matters by the same methods of compromise and accommodation as are used in resolving equally difficult differences relating to substantive terms or conditions of employment. *In neither case will we presume to pass upon which is the preferable position or to dictate terms of an agreement, but will, rather, concern ourselves only with whether the parties are acting in good faith.*" (Emphasis supplied).

However, in the instant case the Board has dictated that the Company cannot insist on using a professional stenographer to make a verbatim record. The instant decision is contrary to Congressional intent and previous Board precedent in that it allows the Board broad discretion to dictate the procedural aspects of bargaining. In the instant case, the current Board members obviously have made a judgment on the merits of using a professional stenographer and have decided to try to stop that procedure in all bargaining by holding that it is not a "wage, an hour, or other term and condition of employment." By their analysis, the Board members can prohibit any procedure with which they happen to disagree, because strictly speaking no procedural matter is

literally a "wage, hour, or other term and condition of employment."

The Court should grant a writ of certiorari to review the appropriateness of the shift evidenced in this case from the Board's prior practice of allowing the parties to develop their own bargaining procedures in good faith to the Board's present rule of dictating the procedures of collective bargaining. We submit that the current approach is contrary to the intent of Congress.

2. The Third Circuit's literal and technical interpretation of Section 8(d) is contrary to decisions of this Court interpreting that statute. This Court has repeatedly emphasized that the NLRA should be interpreted in a manner that will effectuate the fundamental purpose of the Act, which is to encourage labor organizations and employers to resolve disputes through implementation of the collective bargaining process. In *Teamsters Union v. Oliver,* 358 U.S. 283, 295 (1959), the Court recognized that the purpose of the NLRA "is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish through collective negotiation, their own charter for the ordering of industrial relations and thereby to minimize industrial strife." In *Fibreboard Corp. v. NLRB,* 379 U.S. 203 (1964), this Court focused upon whether the Act's "primary purpose" of promoting peaceful settlement of industrial disputes would be furthered by including subcontracting decisions within the scope of Section 8(d)'s mandatory bargaining subjects:

> "The inclusion of 'contracting out' within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary pur-

> poses of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. . . . *To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.* 379 U.S. at 210-11. (Emphasis supplied).

Similarly in *Ford Motor Co. v. NLRB,* 441 U.S. 488, 498 (1979), the Court held that plant cafeteria food prices were a mandatory subject of bargaining, noting that bargaining over such matters would "serve the ends of the National Labor Relations Act." *See also, NLRB v. Wooster Div. of Borg-Warner Corp.,* 356 U.S. 342 (1958) (a proposal was not mandatory because it "modifie[d] the collective-bargaining system provided for in the statute. . . ."); *NLRB v. American National Insurance Co.,* 343 U.S. 395 (1952) (rejecting Board's per se rule that management rights clause was not a mandatory subject of bargaining and noting that the NLRA "is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers"); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 178 (1972) (emphasizing that Section 8(d) "does not immutably fix a list of subjects for mandatory bargaining").

Unlike these prior decisions of this Court, the Third Circuit's decision in the instant case contains no discussion of whether the use of a professional stenographer

to make a verbatim transcript of negotiations will further the collective bargaining process. Instead, the Third Circuit focused only on the phrase in Section 8(d) requiring good faith bargaining over "wages, hours, and other terms and conditions of employment." (App. A at 8a-9a), and held that if a bargaining issue does not literally involve wages, hours, etc., it is not required to be bargained in good faith. (App. A at 9a-10a). Thus, because the professional stenographer issue related to the procedure for bargaining, and was not literally a wage, an hour, etc., the Third Circuit held that neither party was required to bargain in good faith over it. (*Id.*).

This Court's decisions in cases interpreting Section 8(d) indicate that the Board's and the Third Circuit's per se approach in this case is incorrect. In effect, the Board and Third Circuit have held that the presence of a professional stenographer at bargaining can never under any circumstances further the purpose of the NLRA by promoting the collective bargaining process. However, there are many situations in addition to the circumstances in the present case where the presence of a professional stenographer would promote the purpose of the Act under this Court's decisions.[6] Even if there were situations in which the use of a professional stenographer to make a verbatim record impeded bar-

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6. For example, an employer or labor organization might want to use a professional stenographer to make a verbatim record of bargaining because the other party had repeatedly misrepresented past negotiations. There could be situations where the bargaining unit employees request one of the parties to make a verbatim record so that the employees could follow the progress of negotiations. In each of these situations, and any other, the Board would prevent a party from insisting on using a professional stenographer.

gaining, that would not justify the Board and the Third Circuit condemning the practice as a per se violation of the Act. The mandatory bargaining approach requires good faith, so that if an employer or a labor organization did seek to engage a professional stenographer or to insist on any other procedure in order to interfere with or impede bargaining, the Board could issue a cease and desist order to stop the interference in that particular case. This case-by-case approach allows for far more equity and flexibility than the per se rule applied below. Accordingly, the Board's and the Third Circuit's per se approach herein conflicts with the analysis in *American National Insurance, supra,* as well as with the analysis in *Teamsters, supra, Borg-Warner, supra, Fibreboard, supra,* and *Pittsburgh Plate Glass, supra.*

3. That the presence of a stenographer at negotiations serves to effectuate the purposes of the Act is underscored by the fact that for almost thirty years, the Board and courts of appeals viewed this matter as a mandatory subject of collective bargaining. This interpretation, issued by the Board shortly after Section 8(d) was enacted, had been the Board's position for almost thirty years and had been announced in numerous official decisions.[7] Thus, the agency interpretation which

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7. For example, in *St. Louis Typographical Union, supra,* the Board held that (149 N.L.R.B. at 751) "[t]he legality of insisting upon a stenographic transcript at bargaining sessions has been determined in the light of the entire bargaining context rather than on a per se basis." *Accord, Reed & Prince Mfg. Co.,* 96 N.L.R.B. 850, 857 (1951), *enforced as modified,* 205 F.2d 131 (1st Cir. 1953), *cert. denied,* 346 U.S. 887 (1953); *Allis-Chalmers Mfg. Co.,* 106 N.L.R.B. 939 (1953) *enforcement denied on other grounds,* 213 F.2d 374 (7th Cir. 1954);

supports Petitioner's position was not only contemporaneous but also long-standing. On the other hand, the latest interpretation of the Board, announced in this case and in *Bartlett-Collins Co., supra,*—that such issues as the presence of a professional stenographer are not mandatory subjects of bargaining—is neither contemporaneous nor long-standing. Therefore, the Third Circuit should have accorded deference to the Board's contemporaneous interpretation rather than to the Board's more recent contradictory interpretation of the Act. *E.g., General Electric Co. v. Gilbert,* 429 U.S. 125, 143-145 (1976); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 285-289 (1974); *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).[8] Under this Court's decisions, deference to the

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East Texas Steel Castings Co., 108 N.L.R.B. 1078, 1085 (1954); *Southern Transport, Inc.,* 150 N.L.R.B. 305 (1974), *enforcement denied,* 355 F.2d 978 (8th Cir. 1966); *B. F. Diamond Construction Co.,* 163 N.L.R.B. 161 (1967), *enforced,* 401 F.2d 910 (5th Cir. 1969); *Architectural Fiberglass,* 165 N.L.R.B. 238 (1967). *Hilton Mobile Homes,* 155 NLRB 873 (1965), *modified on other grounds,* 387 F.2d 7 (8th Cir. 1967); *West Coast Casket Co.,* 192 N.L.R.B. 624, *enforced as modified,* 469 F.2d 871 (9th Cir. 1972); *Inter-Polymer Industries,* 196 N.L.R.B. 729 (1972), *enforced* 480 F.2d 631 (9th Cir. 1973); *American Ship Building,* 226 N.L.R.B. 788, *enforced,* 99 L.R.R.M. 2632 (D.C. Cir. 1978).

8. The Third Circuit did not cite or discuss this Court's decisions in *Skidmore, supra* and *Gilbert, supra,* but did attempt to distinguish the decision in *Bell Aerospace, supra.* That attempted distinction is not persuasive, however. The Third Circuit said that this Court in *Bell Aerospace* accorded deference to the Board's contemporaneous interpretation that "managerial employees" were not covered by the NLRA because Congress had reenacted the NLRA in the face of that interpretation without changing the relevant portion of the Act and had therefore evidenced agreement with the inter-

contemporaneous interpretation was particularly appropriate here since Congress has not changed the original wording of Section 8(d) and the Board has not claimed there have been "significant developments in industrial life" warranting a change in the interpretation of the statute. Compare, *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

Moreover, the earlier interpretation was well reasoned and consistent with the terms and policy of the Act. In contrast, the approach embraced by the Third Circuit's decision in this case is totally unreasonable. Specifically, the Third Circuit ruled that it is a per se violation of the Act for a party to insist on the presence of a professional stenographer as a prerequisite to negotiations, but that "it is equally violative of the Act to insist on the absence of stenographers as to insist that stenographers be present." (App. A at 13a). Thus, under the approach adopted by the Third Circuit, a deadlock could result, with one party insisting upon the presence of a stenographer and the other party insisting upon the absence of the stenographer. There would be no way to resolve this deadlock, because *both* parties would be

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pretation. (App. A at 10a-11a). Actually, in *Bell Aerospace, supra,* this Court's analysis relied independently on the Board's contemporaneous interpretation of the Act. 416 U.S. at 289. But even if the reenactment of the NLRA by Congress were the only factor in *Bell Aerospace* for this Court's decision to accord more deference to the Board's contemporaneous interpretation, the fact is that Section 8(d) was also reenacted in 1959 (along with the provision of the Act pertinent in *Bell Aerospace, supra*). It can be said that Congress evidenced agreement with the Board's contemporaneous interpretation on the present issue by not amending §8(d) in 1959 to avoid that interpretation, just as that same reasoning was applied in *Bell Aerospace, supra.*

guilty of a violation. At least under the approach followed by the Board for thirty years, the deadlock could be resolved by determining whether one of the parties was acting in bad faith.[9] Under the current per se approach the good faith or bad faith of the parties is totally irrelevant. Therefore, because the current approach of the Board and the Third Circuit results in an unreasonable interpretation of Section 8(d), the earlier more reasoned approach should be accorded more deference by this Court. As discussed above, the Board's contemporaneous interpretation was consistent with Congress' intent under the Taft-Hartley amendments to prevent the Board from dictating the procedure and substance of bargaining.

4. Various courts of appeals have also held that procedural matters, including the instant practice, are mandatory subjects of bargaining, in direct conflict with the decision of the Third Circuit in this case. In *NLRB v. Southern Transport, Inc.*, 355 F.2d 978 (8th Cir. 1966), the Eighth Circuit considered whether a demand to use a professional stenographer to take verbatim notes of bargaining was subject to the duty to bargain in good

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9. Instead, a "cat and mouse" game has been created, so that each party will be able to reject some procedural matter proposed by the other party. If a procedural matter is insisted upon by the proposing party, then the objecting party can file for a per se violation of the NLRA. This is certainly the antithesis of good faith collective bargaining. It will only lead to an escalation of unfair labor practice proceedings. Absent a positive duty to bargain in good faith over such procedural matters, collective bargaining over substantive issues would be discouraged, not encouraged as intended by the Act. Without such a duty to attempt compromise and accommodation on procedural matters, substantive collective bargaining might not even take place.

faith or whether it could give rise to a per se violation of the Act. The Eighth Circuit found that "[t]here is no legislative sanction against such a procedure nor is the procedure *malum in se*," 355 F.2d 981, and concluded that the procedure was a mandatory subject of bargaining, *id.* After reviewing the facts and circumstances of the employer's request to use a stenographer in *Southern Transport, supra,* the Eighth Circuit held that the employer had not failed to bargain in good faith. 355 F.2d at 986. In so holding, the Eighth Circuit found that having a record of negotiations "would be a positive force for good faith negotiations."[10]

Similarly in *NLRB v. Reed & Prince Mfg. Co.,* 205 F.2d 131, 139 (1st Cir. 1953), *cert. denied,* 346 U.S. 887 (1953), the First Circuit held that it was not "inclined to agree with the Board that the Company's insistence, over the Union's strenuous objection, on having a stenotypist present at all the bargaining meetings to take down a verbatim transcript of the proceedings was evidence of the Company's bad faith." The First Circuit held that insisting upon the presence of a professional stenographer to make a verbatim record of negotiations was not evidence of bad faith, let alone a per se viola-

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10. The Eighth Circuit explained that:

> "The bargaining table is certainly no place for frivolity or dishonesty, which a person is allowed to disclaim simply because no accurate record is kept. All parties present at negotiating sessions are responsible individuals who in turn must be responsible for their acts. If a party does not want to be held to his word, he should exercise careful discretion during negotiations. This discretion and good faith, however, are demanded at all times, by both parties, and are not to be turned 'on' and 'off' merely by the factor of whether or not a record is being kept." 355 F.2d at 985.

tion of the Act. The Third Circuit's decision also conflicts with decisions of the Seventh and Fifth Circuits which hold that such procedural matters as the place and time of bargaining are mandatory subjects of bargaining. *Mid-America Transportation Co. v. NLRB,* 325 F.2d 87 (7th Cir. 1963); *NLRB v. Exchange Parts Co.,* 339 F.2d 829 (5th Cir. 1965).[11]

Accordingly, the Court should grant a writ of certiorari to resolve the conflict among the Circuit courts with respect to the question presented. The conflict became even more serious when the Tenth Circuit recently enforced the Board's Order in *Bartlett-Collins, supra,* and followed the Third Circuit's approach in this case. *NLRB v. Bartlett-Collins Co.,* 106 L.R.R.M. 2272 (10th Cir. 1981), *petition for cert. filed,* No. 80-1662 (April 1, 1981).

5. The Company's desire to use the verbatim record to communicate collective bargaining proceedings to the bargaining unit employees, management officials and other interested persons clearly effectuated the

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11. The Third Circuit's attempt to distinguish these cases was based on a faulty legal premise. The Third Circuit stated that the fact that "courts of appeals had utilized a good faith standard in earlier cases is not dispositive in light of the existing Board position at the time those cases were decided." (App. A at 11a). However, under Sections 10(e) and (f) of the Act, the courts of appeals pass judgment on whether the Board's interpretation of the Act is correct. 29 U.S.C. §§160(e) and (f). See also, *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951); *NLRB v. Brown,* 380 U.S. 278 (1965). Thus, when the Board changes an intepretation of the Act, the fact that the courts of appeals had approved the earlier interpretation is a reason to reject the new interpretation, and this Court has so held. *See, e.g., NLRB v. Bell Aerospace, supra,* 416 U.S. at 288.

policies of the Act in this case. As the Board itself has recognized on numerous occasions, an employer has the right to communicate with its employees regarding the status of the negotiations if the employer does not bypass the union bargaining committee and bargain directly with the employees. *E.g., William Kugler & Bro., Inc.*, 193 N.L.R.B. 427 (1971); *Adolph Coors Co.*, 235 N.L.R.B. 271 (1978). Indeed, any other conclusion would appear to raise serious constitutional questions regarding infringement upon an employer's right of free speech.[12]

Apparently recognizing that it could not legally or constitutionally prohibit an employer from communicating the progress of negotiations to the employees through the availability of a verbatim record, the Board has attempted to accomplish indirectly what it cannot do directly by prohibiting the employer from making the verbatim record in the first instance. The Board's approach actually contravenes the policies underlying the Act, however, because it prevents the employer from making available to the employees the most accurate report of collective bargaining. Similarly, a union could not legally insist upon having a verbatim record even if the bargaining unit employees had requested a record for their own review. In each case, the

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12. Section 8(c) of the Act makes clear that employers and labor organizations are free to disseminate "any views, argument or opinion" to the employees so long as the communication "contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c). "The purpose [of §8(c)] is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 45.

Board could prevent the publication of the record by preventing the record from being made.[13]

The Third Circuit's decision also has the anomalous result of holding a party accountable for what he says and what he is told during bargaining, while not allowing the party to insist on making a verbatim record of his own or the other party's comments. Collective bargaining negotiations are often the subject of scrutiny by labor arbitrators and federal and state courts seeking to understand the intent and meaning of the agreement and by NLRB officials seeking to determine whether an unfair labor practice has been committed. A verbatim record of bargaining is of benefit in that it protects a party from having negotiations unintentionally or deliberately misrepresented. *NLRB v. Southern Transport, supra,* 355 F.2d at 986. The Third Circuit's per se approach is so unreasonable that it could allow even a party who is bent on later misrepresenting the collective bargaining negotiations to object to and prevent the making of a verbatim record of the proceedings. However, since an employer or labor organization is accountable for what was said during negotiations, either party should be able to insist on a verbatim record for later use in the grievance procedure, labor artibration,

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13. The Third Circuit's decision forces an employer or labor organization to communicate the bargaining proceedings by means of recollections or notes which are subject to censorship and editorial comment. The fact that recollections and notes often reflect self interest make them inherently less accurate than a verbatim record. Given the premise that bargaining unit employees should be accurately informed of collective bargaining proceedings, if one party wants to provide the employees with a verbatim record, the practice ought to be encouraged, not prevented as here.

NLRA cases, and federal and state court cases.[14] *NLRB v. Southern Transport, supra.*

As has been recognized by the Board and the courts of appeals, the use of a professional stenographer to make a verbatim record of bargaining is a procedure which promotes collective bargaining. The facts and circumstances of this case also establish that fact. Although the professional stenographer was present throughout bargaining, the Company and the Union were able to negotiate a new collective bargaining agreement. That is why the decisions in this case are particularly troublesome. Bargaining was not impeded by this particular procedure. Yet because current Board members evidently have some philosophical disagreement with the procedure, the fact that the procedure had no harmful effect was totally irrelevant.

The Board's approach can only lead to more and more per se rules—"do's and don'ts" of bargaining to be applied regardless of the facts and circumstances of the particular negotiation. For, under the analysis of the Board and the Third Circuit, any procedure, irrespective of its merit can be manipulated into a per se violation of the Act. Under that analysis, if the Board decides that an employer should not have any notes of what was said at bargaining or that bargaining should take

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14. The Third Circuit's decision even allows one party to bargaining to prevent the other party from making a verbatim record for internal communications purposes. If a union or employer wanted a verbatim record for strictly internal use, and the other party objected, the Board could prevent even the internal communication of the record by ordering that the professional stenographer not be present at bargaining to make the record.

place in the plant instead of the union hall, etc., nothing would prevent the Board from finding a per se violation of the Act.

However, the instant per se approach is the very thing Congress wanted to avoid when it enacted the Taft-Hartley Act, because it allows the Board to force concessions and to pass on the merits of each party's position, regardless of good faith, and discourages collective bargaining. Congress unquestionably did not intend that parties would have to bargain in good faith over substantive matters, but would not be required to bargain in good faith over the procedures for such bargaining. The fact that the Board had held for almost thirty years that bargaining over such procedures was mandatory and has only recently reversed its field shows that the new per se approach is questionable at best. The Court should grant a writ of certiorari in this case to review the Board's and the Third Circuit's new interpretation of the Act. The Court's guidance would be of great benefit to the Board, the courts of appeals, employers and labor organizations.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2299

LATROBE STEEL COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Intervenor

No. 79-2709

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent
LATROBE STEEL COMPANY,
Intervenor

PETITIONS FOR REVIEW OF ORDER OF
NATIONAL LABOR RELATIONS BOARD
BOARD NO. 6-CA-10333

Argued June 12, 1980

Before: HUNTER, WEIS, and SLOVITER, *Circuit Judges*
(Filed August 19, 1980)

Peter D. Post (Argued)
Attorney for Latrobe Steel Company

Daniel P. McIntyre (Argued)
Attorney for United Steelworkers of America, AFL-CIO

Vivian Miller
Attorney for National Labor Relations Board

Appendix A.

Opinion of the Court

HUNTER, *Circuit Judge:*

1. This case centers around the attempted negotiation of a collective bargaining contract between the Latrobe Steel Company (the Company) and the United Steelworkers of America (the Union). We are called upon to review the decision of the National Labor Relations Board, which found the Company guilty of three unfair labor practices for refusing to bargain with the Union in violation of §8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5) (1976) (the Act), and acquitted the company of another charge. The Board also found that a strike which occurred subsequent to the alleged unfair labor practice was an unfair labor practice strike and ordered reinstatement of the strikers with back pay. The Board presents a cross petition for enforcement of its decision.

2. The parties met 27 times between June 7 and August 1, 1977, but were unable to conclude an agreement to replace the existing 1974 contract. At the expiration of that contract, on August 1, 1977, the Union went out on strike. Negotiations continued intermittently from mid August until November, when they resumed on a full time basis. The Union filed an unfair labor practice charge on December 20, 1977, which alleged several violations of the Act. Specifically, the union alleged that the Company had violated the duty to bargain imposed by §8(a)(5) of the Act by improperly insisting on the presence of professional stenographers at bargaining sessions and by insisting "to impasse" on the inclusion in the collective bargaining agreement of three clauses concerning non-mandatory subjects of bargaining.

Appendix A.

3. The case was heard by an administrative law judge (ALJ) who found unfair labor practices based on the stenographer issue and two of the three contractual issues. The ALJ further found that because of these unfair labor practices the strike was an "unfair labor practice strike." The Board affirmed the rulings, findings, and conclusions of the ALJ. We will enforce the Board's decision only insofar as it finds that the Company's insistence on the issue of the presence of a stenographer constitutes an unfair labor practice. We will not enforce the decisions relative to the unfair labor practices based on the two proposed contract clauses, or to the characterization of the strike. Finally, we will affirm the dismissal of the charge based on the third contractual clause.

I

A. THE STENOGRAPHER ISSUE

4. At the first negotiating session, the Company's chief negotiator introduced two professional court reporters and indicated that these reporters would, on the Company's behalf, record all of the negotiations. He further noted that nothing would be "off the record" and that the transcripts of the negotiations would be made available in the Company's personnel office to all interested persons, including the employees. The Union objected to this procedure. Following a lengthy discussion, the company negotiator stated "[a]ll right, we have been talking about this subject for almost an hour. We can talk about it for another hour, but I have to inform you that the transcripts will be at the personnel office. That is as blunt as I can put it." Despite continued objections by the Union throughout the course of the negotiations, and the filing of an unfair labor practice charge on June

21, 1977,[1] the stenographers were present at every negotiating session.[2] Based on this and other evidence, the ALJ concluded that it was clear that the Company would only negotiate on the record, with stenographers present, and that no discussion of negotiable issues would be permitted to take place off the record.

5. In addition, the ALJ found that the issue was a non-mandatory subject of bargaining. He therefore found the Company guilty of an unfair labor practice for refusing to bargain with the Union.

B. THE CONTRACT PROPOSALS

6. In prior contracts, the Company, which produces specialty steel products, and the Union had adopted the Basic Steel Settlement Agreement, negotiated between the Union and the companies comprising the basic steel industry. In the instant negotiations, the Union again demanded the adoption of the Basic Steel Settlement Agreement, as well as the continuation of the provisions of the 1974 agreement between the Company and the Union. The Company, however, sought to negotiate a separate agreement. In addition, the Company proposed 22 specific changes in the existing agreement. The Union, in addition to its position on the Basic Steel Agreement, made 21 specific proposals.

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1. The June 21 charge cited the Company for insisting on having stenographers present and on making the transcripts available to any employee. This charge was amended by the December 20 charge which eliminated references to the availability of the transcript.

2. Stenographers were also present at almost all of the sessions subsequent to the strike.

Appendix A.

7. Three of the Company's proposals are relevant to this case. First, the Company proposed that the local union be made a signatory to the collective bargaining agreement. Traditionally, the Union had been the only signatory to the agreement, although officers of the local had signed in their capacity as members of the Union bargaining committee. Since 1937, the Union, or its predecessors, had been the recognized bargaining representative of the employees.

8. Second, the Company demanded that the grievance procedure be altered to require individual employees to sign all grievances. This would, in effect, have precluded the Union from bringing general grievances on behalf of unidentified employees.

9. Finally, the Company proposed a change which would have given employees the option to attempt to settle grievances at the second level of the grievance procedure, either with or without the presence of a union representative. A similar option had previously existed at the first level by agreement of the parties.

10. The ALJ found the first two proposals to concern non-mandatory subjects of bargaining and that an impasse existed prior to the time the Union went on strike. He further found that the Company's insistence on the first two proposed clauses contributed to, and helped to cause the impasse. He stated that it was impossible to find, as the Company contended, that the impasse would have occurred in the absence of the non-mandatory proposals. Finally, the ALJ found that the third disputed proposal did not constitute a non-mandatory subject of bargaining. Accordingly this charge was dismissed.

II

11. Section 8(a)(5) of the Act states that "[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. . . ." 29 U.S.C. §158(a)(5) (1976). Section 8(d) defines collective bargaining, in relevant part, as the

> performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Id. §158(d).

12. In *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), the Supreme Court held that the duty to bargain in good faith is limited to the subjects of wages, hours and terms and conditions of employment. On matters concerning those subjects "neither party is legally obligated to yield." *Id.* at 349. On the other, the so-called non-mandatory matters, "each party is free to bargain or not to bargain, and to agree or not to agree." *Id.* However, a party is not permitted to insist on a non-mandatory subject as a condition or a prerequisite to an agreement on the mandatory subjects. *Id.; NLRB v. Operating Engineers Local 542,* 532 F.2d 902, 907 (3d Cir. 1976), *cert. denied,* 429 U.S. 1072 (1977). Such insistence constitutes, in effect, "a refusal to bargain about the subjects that are within the scope of mandatory bargaining." *Borg-Warner,* 356 U.S. at 349.

13. In the instant case, the Company was found to have committed unfair labor practices by refusing to bargain in that it unlawfully insisted on three allegedly non-mandatory subjects. A charge based on insistence on a fourth non-mandatory subject was dropped by the ALJ. As to each of these alleged non-mandatory subjects we must first review the Board's determination of whether or not the issue involved was in fact non-mandatory. We must then consider whether there was unlawful insistence by the company on that subject. The Supreme Court has made it clear that the Board has special expertise in classifying bargaining subjects as mandatory or non-mandatory and that Congress specifically delegated to the Board the primary responsibility of defining the scope of the duty to bargain. *See Ford Motor Co. v. NLRB,* 441 U.S. 488, 495-96 (1979); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 685-86 (1965). Accordingly, where the Board order has reasonable basis in law and is not inconsistent with the structure of the Act, our review is quite circumscribed. *Ford Motor Co.,* 441 U.S. at 497.

A. STENOGRAPHERS

14. In *Bartlett-Collins Co.,* 237 N.L.R.B. 770 (1978), the Board overruled a long line of cases which had, in effect, treated issues preliminary to the negotiation of an agreement, including the issue of the presence of a court reporter at negotiations, as mandatory subjects of bargaining.[3] *Id.* at 772-73. The Board's prior position

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3. In St. Louis Typographical Union, No. 8, 149 N.L.R.B. 750 (1964), the Board traced the development of the stenographer issue following the case of Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1951), which had treated the company's insistence on stenographers as evidence of bad faith.

had been that "preliminary matters are just as much part of the process of collective bargaining as the negotiations over wages, hours, etc.," *General Electric Co.*, 173 N.L.R.B. 253, 257 (1968), and that it was

> wholly consistent with the purposes of the Act that the parties be allowed to arrive at a resolution of their differences on preliminary matters by the same methods of compromise and accommodation as are used in resolving equally difficult differences relating to substantive terms and conditions of employment.

St. Louis Typographical Union, No. 8, 149 N.L.R.B. 750, 752 (1964). Accordingly, the Board had applied a good faith standard in evaluating the propriety of a party's insistence on the presence of stenographers. *See, e.g., Architectural Fiberglass Co.*, 165 N.L.R.B. 238, 239 (1967); *St. Louis Typographical Union, No. 8*, 149 N.L.R.B. 750, 751-52 (1964); *Allis Chalmers Mfg. Co.*, 106 N.L.R.B. 939 (1953). In *Bartlett-Collins*, however, the Board reexamined the question of the presence of court reporters at negotiating sessions and concluded that the issue did not involve "wages, hours and other

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In subsequent decisions, the legality of insisting upon a stenographic transcript at bargaining session has been determined in light of the entire bargaining context rather than on a *per se* basis. Similarly, in cases dealing with charges of a refusal to bargain arising from adamant insistence on other conditions preliminary to actual bargaining, such as the determination of the time or place of bargaining, the Board has avoided establishing rigid standards favoring any particular proposal, but has, rather, attempted to examine each case in terms of whether or not the positions were taken to avoid or frustrate the legal objection to bargain.

149 N.L.R.B. at 751-52 (footnote omitted).

terms and conditions of employment" 237 N.L.R.B. at 772. The Board reasoned that

> The question of whether a court reporter should be present during negotiations is a threshhold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase "wages, hours, and other terms and conditions of employment." As it is our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshhold issue.

Id. at 773.

15. The Board's newly expressed position is a reasonable interpretation of the Act. We perceive no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees. *Cf. Chemical Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (mandatory subjects limited to issues that settle an aspect of the relationship between the employer and employees); *NLRB v. Massachusetts Nurses Ass'n*, 557 F.2d 894, 897-98 (1st Cir. 1977) (an interest arbitration clause is a non-mandatory subject of bargaining as it bears only a remote or incidental relationship to terms or conditions of employment); *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 877 (3d Cir. 1968) (principle at heart of statutory provision is requiring negotiation on basic terms which are vital to the employees' economic interest). It would be contrary to the policy of the Act, which mandates negotiation over the substantive provisions of the employer-employee rela-

tionship, to permit negotiations to breakdown over this preliminary procedural issue.

16. The Company contends that the Board's new position is contrary to law. To support this contention the Company argues that the Board's long standing interpretation of the Act, which had applied a good faith standard, is entitled to great weight. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). In addition, the Company cites three court of appeals cases which have applied the good faith standard to preliminary issues of bargaining procedures. *See NLRB v. Southern Transport, Inc.*, 355 F.2d 978 (8th Cir. 1966) (stenographers); *Mid-America Transportation Co. v. NLRB*, 325 F.2d 87 (7th Cir. 1963) (site of bargaining); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953) (insistence on stenographers is not evidence of bad faith).

17. The Company's reliance on these cases, however, is misplaced. In *Bell Aerospace*, the Board attempted to change its prior long-standing position concerning the Acts' coverage of managerial employees. The Court used the Board's long-standing interpretation of the Act in conjunction with its finding of a clearly expressed legislative intent that managerial employees were outside of the scope of the Act. 416 U.S. at 274-89. In particular, the Court noted on Congress' reenactment of the legislation without relevant change in the face of the Board's early cases as evidence of congressional agreement with the Board's position. *Id.* at 275. This is different from the instant case where the only clearly expressed intent of Congress was that the definition of mandatory subjects of bargaining was peculiarly within the Board's area of expertise. *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-96 (1979). In such cases, it is

clear that so long as the Board's new position is fully reasoned and explained, and that the position does not exceed the bounds of its Act, the Board is not precluded from overruling its prior cases.[4] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 264-267 (1975). *See Local 777, Seafarers International Union*, 603 F.2d 862, 893-94 (D.C. Cir. 1978); *NLRB v. Wentworth Institute*, 515 F.2d 550, 555 (1st Cir. 1975). Moreover, the fact that three courts of appeals had utilized a good faith standard in earlier cases is not dispositive in light of the existing Board position at the time those cases were decided.[5]

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4. The Company argues that we should not accept the Board's new position because it failed in *Bartlett-Collins* to explicitly overrule its prior line of cases. *See* West Sand & Gravel, 87 C.C.H. ¶11,800, n.8 (1st Cir. 1979). Without passing on the necessity of explicit "overruling," we note that the Company's contention is belied by the Board's statement in *Bartlett-Collins* that stenographers are a non-mandatory subject of bargaining and "[p]rior Board decisions indicating to the contrary are hereby overruled." 237 N.L.R.B. at 773.

5. The Company contests the retroactivity of the Board's order and urges its reliance on the prior position of the Board only insofar as it relates to the imposition of the Board's "extraordinary remedies concerning reinstatement and back pay." Since we deny enforcement of the orders for reinstatement and back pay on other grounds, we need not consider the issue further. Moreover, in the absence of the orders for reinstatement and back pay, the sole effect of the finding of this unfair labor practice is the issuance of a cease and desist order. The only effect of this order in this case is to prevent similar activity in the future. Accordingly, we can find no hardship to the Company from the Board's retroactive change in position. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947); Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 389-90 (D.C. Cir. 1972).

18. The Company also argues that the Board's new position expands the concept of non-mandatory subjects beyond that which was intended by *Borg-Warner*. This argument would have us limit the applicability of the mandatory, non-mandatory dichotomy to those issues which a party seeks to incorporate into a collective bargaining agreement. It is based on the statement in *Borg-Warner* that the employer may not "refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining." *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). *Borg-Warner* is not so limited. The opinion notes that there is a core of issues about which the parties are compelled by the Act to bargain, but about which they need not agree. The Court's reasoning makes clear that the parties are not to be permitted to avoid bargaining on these core issues by insisting on subjects outside of this core. As long as the issue is not defined to be within this core of wages, hours and other terms and conditions of employment, it matters not whether the issue concerns a clause to be inserted in the current contract. Moreover, even were we to find that *Borg-Warner* was limited in the manner suggested by the Company, it would not necessarily follow that the Board overstepped its authority in applying a rule based on the *Borg-Warner* rationale to these, preliminary, procedural issues. Accordingly, we will affirm the Board's conclusion that the presence or absence of stenographers constitutes a non-mandatory subject of bargaining.

19. We are, however, concerned with the Board's affirmance of a decision of an ALJ which seems to imply that in all instances, the party that wishes to introduce a stenographer into the negotiations is committing the

unfair labor practice. *See generally NLRB v. Southern Transport, Inc.*, 355 F.2d 978 (8th Cir. 1966); *St. Louis Typographical Union. No. 8*, 149 N.L.R.B. 750, 758 (1964) (discussing the benefits of stenographers at negotiations).[6] In *Bartlett-Collins*, the Board explicitly stated that the issue of the presence of a stenographer was a matter "over which neither party is lawfully entitled to insist to impasse." 237 N.L.R.B. at 772-73. It would appear that it is equally violative of the Act to insist on the absence of stenographers as to insist that stenographers be present. The fact that an issue is a non-mandatory subject of bargaining does not of itself require that one substantive result be favored over another. It implies only that the parties may not preclude other negotiations on the basis of that issue.[7] *Borg-Warner*, 356 U.S. at 349. In the instant case, however, the union was not charged with an unfair labor practice as they stood ready to bargain, and in fact did negotiate, in the presence of the stenographer. Accordingly, the substantive question of the appropriateness of stenographers was not before the Board in this case.

20. Having concluded that the stenographer issue is a non-mandatory subject of bargaining, we must decide if the company unlawfully insisted upon the pres-

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6. The ALJ's decision notes that the introduction of stenographic reporters into conference room is itself disruptive of bargaining.

7. It is, of course, clear that in a case where the parties insist on conflicting positions, the dispute must be resolved in some way. First, the appropriate action would be a finding of unfair labor practices, followed by cease and desist orders, on both parties. If this fails to break the deadlock, it may well then fall upon the Board to settle the issue by examining the totality of circumstances in the case.

ence of stenographers. The ALJ found that the Company violated sections 8(a)(5) and (1) of the Act "by insisting to impasse upon professional reporters to make verbatim transcripts." In making this finding, the ALJ followed the language of *Bartlett-Collins* and numerous other cases which have made it unlawful to insist upon non-mandatory subjects "to impasse." 237 N.L.R.B. at 773; *see, e.g., National Fresh Fruit & Vegetable Co. v. NLRB,* 565 F.2d 1331, 1334 (5th Cir. 1978); *Philip Carey Mfg. Co. v. NLRB,* 331 F.2d 720, 727-28 (6th Cir.), *cert. denied,* 379 U.S. 888 (1964). The Company contends that there was no "impasse" in this case because the parties continued to bargain in the presence of the stenographer and that when an impasse finally occurred, it had nothing to do with the stenographers, but was rather due to the inability of the parties to come to an agreement over mandatory subjects.

21. Much of the confusion over this issue is attributable to the talismanic invocation of the word "impasse" to describe that level of insistence which triggers the *Borg-Warner* unfair labor practice. The concept of "impasse" is relevant in several contexts involving collective bargaining. In each context, however, its significance is somewhat different. "Impasse" may be used to describe that point at which there is a sufficient disagreement over a mandatory subject of bargaining to permit unilateral action by one of the parties on that subject. *See, e.g., NLRB v. Katz,* 369 U.S. 736, 741-42 (1964); *Dallas General Drivers Local 745 v. NLRB,* 355 F.2d 842, 844-45 (D.C. Cir. 1966); *Industrial Union of Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615, 621 (3d Cir. 1963), *cert. denied,* 375 U.S. 984 (1964). It may also be used to refer to a breakdown in all negotia-

tions over either one or several issues. *See, e.g., Oil, Chemical & Atomic Workers Local 3-89 v. NLRB,* 405 F.2d 1111, 1117 (D.C. Cir. 1968); *accord, Philip Carey Mfg. Co. v. NLRB,* 331 F.2d 720, 726-28 (6th Cir.), *cert. denied,* 379 U.S. 888 (1964); *Industrial Union of Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615 (3d Cir. 1963), *cert. denied,* 375 U.S. 984 (1964). In this latter sense, "impasse" is relevant to the *Borg-Warner* question. *See* page 17, *infra; Industrial Union of Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615, 618 (3d Cir. 1963), *cert. denied,* 375 U.S. 984 (1964); *accord, Oil, Chemical & Atomic Workers Local 3-89 v. NLRB,* 405 F.2d 1111, 1117 (D.C. Cir. 1968); *Philip Carey Mfg. Co. v. NLRB,* 331 F.2d 720 (6th Cir.), *cert. denied,* 379 U.S. 888 (1964). We have grave doubts, however, as to the usefulness of the concept of "impasse" as a level of disagreement over a single issue where that issue is a non-mandatory subject of bargaining. As *Borg-Warner* makes clear, there can be no adverse consequence from a party's failure to agree or even his failure to bargain about a non-mandatory subject of bargaining. What *Borg-Warner* prohibits is insistence upon a non-mandatory subject as a condition precedent to entering an agreement. 356 U.S. at 349. This is the standard which must guide the inquiry. *See NLRB v. Operating Engineers Local 542,* 532 F.2d 902, 907 (3d Cir. 1976), *cert. denied,* 429 U.S. 1072 (1977); *accord, NLRB v. Sheet Metal Workers Local 38,* 575 F.2d 394, 398 (2d Cir. (1978); *Hess Oil Corp. v. NLRB,* 415 F.2d 440 (5th Cir. 1969).

22. When viewed in this light, we believe that there is substantial evidence on the record as a whole, *see Universal Camera Co. v. NLRB,* 340 U.S. 474 (1951), to support the Board's finding that the Company insisted

on the presence of stenographers as a precondition to bargaining and, a fortiori, as a precondition to any agreement on mandatory issues. After almost one hour of discussion, and despite vigorous union objection, the Company negotiator simply stated that the transcript would be available to be read and that that was "as blunt as [he] could put it." To require the union to have refused to bargain in the face of this insistence would be contrary to the purpose of *Borg-Warner*. Accordingly, the Board's finding of an unfair labor practice on the stenographer issue will be affirmed.

B. THE CONTRACT PROVISIONS

23. We now turn to the Company's contract proposals. Because we conclude that the Company did not unlawfully insist on these proposals, we shall not enforce the unfair labor practice findings relating to them. This decision makes it unnecessary to address the Company's contention that the clauses in question actually concerned mandatory subjects of bargaining. This issue is irrelevant to our disposition of the case.

24. The ALJ found it to be undisputed that the negotiations had reached an impasse by the time that the union went on strike. He relied on the existence of that impasse to support his finding of unlawful insistence by the company on the allegedly non-mandatory contract proposals.[8]

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8. This reliance was necessary, due to the absence of direct evidence that the Company made the acceptance of the non-mandatory proposals conditions precedent to any agreement. While it was shown that the Company's position on those proposals was frequently reiterated and did not change from June 7, 1977, until February 6, 1978, when they were withdrawn, there

25. Once again, analysis must begin with *Borg-Warner's* holding that a party may not avoid bargaining on the mandatory subjects by insistence on non-mandatory proposals. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. at 349; *see Oil, Chemical & Atomic Workers Local 3-89 v. NLRB*, 405 F.2d 1111, 1117 (D.C. Cir. 1968). This is precisely what occurs when a party's insistence on non-mandatory proposals causes negotiations between the parties to reach an impasse. Moreover, it is well settled that the insistence upon the non-mandatory proposal need not be the sole cause of the parties' failure to reach agreement in order for a *Borg-Warner* violation to be found. *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 618 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964); *accord, Rogers Mfg. Co. v NLRB*, 486 F.2d 644, 649 (6th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); *Philip Carey Mfg. v. NLRB*, 331 F.2d 720, 728 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964).

26. The Company argues that it may not be held responsible for the impasse, which it argues was caused by the Union's insistence on acceptance of the basic steel settlement agreement rather than by its insistence on the non-mandatory proposals. It contends that an impasse on the mandatory subject of bargaining would have occurred even in the absence of its position on the non-mandatory proposals. The ALJ did not accept this

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was nothing to indicate that the Company conditioned bargaining on their acceptance. It is well settled that a party has a right to propose, even repeatedly, non-mandatory subjects. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958); Oil, Chemical & Atomic Workers Local 3-89 v. NLRB, 405 F.2d 1111, 1117 (D.C. Cir. 1968); Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 727 (6th Cir.) *cert. denied*, 379 U.S. 888 (1964).

contention, concluding that "it is impossible to know as a matter of hindsight what the union might have done . . . if the [company] had not exacerbated the negotiations with unilaterally imposed conditions." We cannot agree with this conclusion.

27. The record demonstrates that even had the Company dropped its non-mandatory proposals, the parties would have been at impasse. From June 7 until August 1, the Union did not move from its original positions. Most notably, a witness for the general counsel testified the Union insisted that there would be a strike unless the Company agreed to accept the Basic Steel Settlement Agreement. Indeed, the evidence indicates that the Union's position was that it would not even call a meeting of the membership unless the Company accepted the basic steel settlement agreement and dropped its 22 demands. The Company's negotiator testified that shortly before the strike, members of the Union committee had stated "they had a mandate from the rank and file that they must have the 1977 Steel Settlement Agreement in its entirety, and there are to be no changes in the 1974 basic agreement, and that there would be no meetings as far as ratification meetings or any other type of meetings unless they satisfied that mandate." This position was maintained by the Union far beyond the date at which the ALJ found the bargaining impasse. We do not believe that there is substantial evidence on the record to support the Board's conclusion that the Company had not met its burden in demonstrating that an impasse would have occurred even in the absence of the non-mandatory proposals.

28. While it is true that insistence on non-mandatory proposal need not be the sole cause of the impasse

in negotiations, it must be a cause of the impasse. In the instant case, the impasse would have occurred even absent the party's insistence on the non-mandatory proposals. Under the facts of this case, it cannot be said that the insistence on the non-mandatory proposal prevented agreement on any mandatory subjects.[9] Accordingly, the prohibition of *Borg-Warner* has not been violated. The mere fact of an impasse coincidental to continued disagreement on a non-mandatory subject of bargaining will not trigger the *Borg-Warner* unfair labor practice.

29. Accordingly, we will deny enforcement of the finding of unfair labor practices based on the Company's two contract proposals. It also becomes unnecessary to consider the Union's claim that the Company's proposal concerning the second level of the grievance procedure constituted a non-mandatory subject of bargaining. On this, the Board's finding of no unfair labor practice will be affirmed.

III

30. Finally, we consider the Board's conclusion that the strike which began on August 1, 1977, was an unfair labor practice strike, and its corresponding order that the strikers are entitled to reinstatement and back

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9. Nor are we bound by the dictum of the *Marine & Shipbuilding Workers* case which stated "[a]ny other rule would permit insistence upon a non-mandatory item so long as there were *any disputes* as to mandatory topics." Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615, 618 (3d Cir. 1963) (emphasis added), *cert. denied*, 375 U.S. 984 (1964). Any dispute on a mandatory subject is not sufficient to protect a party's insistence to the point of impasse on a non-mandatory subject. The dispute over the non-mandatory subject must itself rise to the level of impasse.

pay, *see Mastro Plastics Corp. v. NLRB,* 350 U.S. 720 (1956); *NLRB v. Cast Optics Corp.,* 458 F.2d 398 (3d Cir.), *cert. denied,* 409 U.S. 850 (1972). For a strike to be deemed an unfair labor practice strike, it must, at least in part, be caused by an unfair labor practice. *See NLRB v. Cast Optics Corp.,* 458 F.2d 398, (3d Cir.), *cert. denied,* 409 U.S. 850 (1972); *Electrical Workers Local 613 v. NLRB,* 328 F.2d 723, 726 (3d Cir. 1964); *accord, Cagle's, Inc. v. NLRB,* 588 F.2d 943, 950 (5th Cir. 1979); *Larand Leisurelies, Inc. v. NLRB,* 523 F.2d 814, 820 (6th Cir. 1975). The mere fact that an unfair labor practice is committed prior to a strike does not necessarily render that strike an unfair labor practice strike. *See NLRB v. Broadmoor Lumber Co.,* 578 F.2d 238, 242 (9th Cir. 1978); *NLRB v. Colonial Haven Nursing Home, Inc.,* 542 F.2d 691, 704-05 (7th Cir. 1976); *cf. Cagle's Inc. v. NLRB,* 588 F.2d 943, 950 (5th Cir. 1979) (must be evidence of causal connection).

31. In the instant case, the Board found that the three unfair labor practices, which it had concluded had been committed by the employer, were causes of the strike. We are presented with a somewhat different question, since we have concluded that only the Company's insistence on the presence of stenographers constituted an unfair labor practice. We do not believe that the record, considered as a whole, could support a finding that the strike was in part caused by this unfair labor practice.[10]

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10. Because of our resolution of this issue it is unnecessary to consider the impact of the language of NLRB v. Stackpole Carbon Co., 105 F.2d 167 (3d Cir.), cert. denied, 308 U.S. 605 (1939), that "the burden rested upon [the company] to show that the strike would have taken place [even in the absence of the unfair labor

32. The record is devoid of evidence that the presence of stenographers contributed to the Union decision to strike. On the contrary, the vice-president of the local, Mr. Ehman, who was a member of the negotiating committee, testified that the Union's position on July 29, 1977, three days before the strike, was that there would be a strike "unless the Union's number one proposal [acceptance of the Basic Steel Settlement Agreement] was agreed to between the parties, and that the Company's 22 demands . . . . were withdrawn." The Company's chief negotiator testified that this position had been expressed by several other members of the Union's negotiating committee as well. Moreover, the Company's chief negotiator testified that on July 29, Mr. Ehman stated, "we will be striking over economics." There is no mention on the record of any link between the strike and the stenographers. Accordingly, we can not affirm the Board's finding that the strike was an unfair labor practice strike and we will not enforce the order of reinstatement and back pay.

33. In summation, we will enforce the order of the NLRB only insofar as it concerns the unfair labor practice based on the Company's unlawful insistence upon the presence of stenographers. The order based on the other unfair labor practice findings will not be enforced, nor will the strike be characterized as an unfair labor practice strike. Finally, we will affirm the Board's dismissal of the remaining unfair labor practice charge.

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practice]." *Id.* at 176; see Simmons, Inc. v. NLRB, 315 F.2d 143, 146-48 (1st Cir. 1963); NLRB v. Larand Leisurelies, 523 F.2d 814, 820 (6th Cir. 1975).

WEIS, *Circuit Judge,* concurring and dissenting.

I agree with the majority that substantial evidence supports the Board's finding that the company committed an unfair labor practice by insisting upon the presence of a stenographer at the bargaining sessions.

My difference with the majority is with its appraisal of the company's demands that the local be made a party to the contract and that all grievances be signed by individual employees. In my view, both of these proposals were non-mandatory subjects of bargaining, and the company's adamant position on them contributed substantially to the failure to reach an agreement on mandatory subjects in violation of §8(a)(5).

For 30 years preceding the bargaining session under discussion here, the company had entered into collective bargaining agreements with the International union and had recognized it as the exclusive bargaining agent for the employees. The International's constitution provided that it was to be "the contracting party in all collective bargaining agreements." Before the strike began, the union took the firm position that it would not accept an agreement violative of that basic policy and warned the company that insistence on that proposal would result in no contract. Considering this evidence, the Board found that the employees had assented to the union's practice over the years and determined that the company was not justified in "insisting to the point of impasse" on the International relinquishing its status as the sole bargaining representative.

I am convinced that this proposal advanced a nonmandatory topic of bargaining. In *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), the

Court held that a recognition clause seeking a substitution of a local for the International union as the signatory to the agreement did not come within the definition of mandatory bargaining. The employer had insisted on such a clause, and both the Board and the courts found this maneuver to be an unfair labor practice. Concededly, the case at hand differs insofar as the employer seeks to add the local, rather than substitute for it. But even if that be an arguably less intrusive encroachment on employees' §9 rights, it nonetheless violates the spirit of *Borg-Warner*. As one commentator notes, *Borg-Warner* and similar decisions reflect a "specific public policy that issues relating principally to the representational status of the parties should be determined without disrupting negotiations—either decided voluntarily by the parties or through the machinery of the Board, but not by coercion at the hands of the stronger party." R. GORMAN, BASIC TEXT ON LABOR LAW 525 (1976). The Board's finding that this contract proposal was on a non-mandatory subject of bargaining, therefore, is correct.

The company's second proposal—that all grievances be signed by individual employees—also concerns a non-mandatory subject. In fact, it is virtually identical to the one we found to be non-mandatory in *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964). That decision is binding on this panel, and, accordingly, the Board should be sustained on its position that the employer engaged in an unfair labor practice by refusing to remove this item from its non-negotiable demands.

The majority does not reach these issues, asserting that there is no evidence demonstrating a causal connection between the employer's insistence on these contract

proposals and the strike. In my view, however, the majority has unduly limited the thrust of precedent in this court.

The controlling case, once again, is *Industrial Union of Marine & Shipbuilding Workers v. NLRB, supra.* There, the employer disputed a Board finding of impasse on non-mandatory subjects by arguing that the proposals under scrutiny played a relatively minor part in the dispute. Buttressing this assertion, the employer pointed to a specific Board finding that an impasse was reached on all disputed matters, not merely the non-mandatory ones. Nevertheless, this court concluded that enough of a nexus between the non-mandatory contract proposals and the impasse had been shown:

> "It was not necessary for the Board to find that the company's insistence on this proposal was the sole cause of the failure to reach agreement. If the proposal is not a mandatory bargaining subject, insistence upon it was a per se violation of the duty to bargain. . . . Any other rule would permit insistence upon a non-mandatory item so long as there were any dispute as to mandatory topics."

Id. at 618 (citations omitted); *accord, NLRB v. American Compress Warehouse, Division of Frost-Whited Co.,* 350 F.2d 365, 368-69 (5th Cir. 1965), *cert. denied,* 382 U.S. 982 (1966). Believing this case to be indistinguishable from *Marine,* I would affirm the Board's decision that these unfair labor practices contributed in a substantial way to the strike. *See also NLRB v. Juniata Packing Co.,* 464 F.2d 153 (3d Cir. 1972); *NLRB v. Cast Optics Corp.,* 458 F.2d 398 (3d Cir.), *cert. denied* 409 U.S. 850 (1972).

As a remedy for the violation, the Board directed reinstatements and back pay. The record shows that the company persisted in its position until February 1978, some six months after the strike began. It then withdrew its insistence on the two non-mandatory subjects, but the strike continued for another two months. The Board decided that the strike as a whole was noneconomic and directed reinstatement for that reason. Until the company changed its position in February, there is substantial evidence to support the Board's conclusion that the strike was noneconomic. It is arguable, however, that after the company dropped its insistence upon non-mandatory subjects in February, the character of the strike changed. I offer no view at this time as to whether the company's change in position limited the relief the Board could have imposed.

Because I believe there was substantial evidence that the employer forced an impasse on non-mandatory subjects of bargaining, I dissent from the majority opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LATROBE STEEL COMPANY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, and UNITED STEELWORKERS OF AMERICA, AFL-CIO, Intervenor.	No. 79-2299
* * * * * *	
UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner, v. NATIONAL LAROR RELATIONS BOARD, Respondent, and LATROBE STEEL COMPANY, Intervenor.	No. 79-2709

Judgment

Before: HUNTER, WEIS, and SLOVITER, Circuit Judges

The above consolidated causes came on to be heard upon the petitions of Latrobe Steel Company and United Steelworkers of America, AFL-CIO, to review an order of the National Labor Relations Board issued on August

22, 1979, against petitioner in No. 79-2299, and upon a cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on June 12, 1980, and has considered the briefs and transcript of record filed in this cause. On August 19, 1980, the Court, being fully advised of the premises, handed down its decision granting in part and denying in part enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Latrobe Steel Company, Latrobe, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with the efforts of United Steelworkers of America, AFL-CIO, herein the Union, to bargain on behalf of the employees in the unit described below by insisting to impasse upon the presence of professional reporters to make a verbatim stenographic record of negotiations as a condition to negotiations with the Union.

(b) In any like or related manner interfering with the efforts of the Union to bargain collectively on behalf of the employees in the unit described below:

> The appropriate unit is: All production and maintenance employees employed by Respondent at its Latrobe, Pennsylvania, facility, excluding office clerical employees, mechanics, confidential employees, managerial employees and guards, professional employees and supervisors as defined in the National Labor Relations Act as amended.

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

Appendix B.

(a) Post at its facility at Latrobe, Pennsylvania, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 6 of the National Labor Relations Board (Pittsburgh, Pennsylvania) after being duly signed by an authorized representative of Petitioner, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to ensure that said notices are not altered, defaced or covered by any other material.

(b) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps Petitioner has taken to comply herewith.

It is further ORDERED that costs be appropriately apportioned between the parties.

BY THE COURT
James Hunter III
Circuit Judge

DATED: March 5, 1981

Appendix B.

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT
OF THE
UNITED STATES COURT OF APPEALS
GRANTING IN PART AND DENYING IN PART
ENFORCEMENT OF AN ORDER
OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT interfere with the efforts of UNITED STEELWORKERS OF AMERICA, AFL-CIO, to bargain on behalf of the employees in the unit described below by insisting to impasse that a professional reporter be present to make stenographic record as a condition to bargaining with the Union.

WE WILL NOT in any like or related manner interfere with the efforts of the Union to bargain collectively on behalf of the employees in the unit described below.

The appropriate unit is: All production and maintenance employees employed by the company at its Latrobe, Pennsylvania, facility, excluding office clerical employees, mechanics, confidential employees, managerial employees and guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

LATROBE STEEL COMPANY
(Employer)

Dated_____ By_____
(Representative) (Title)

Appendix B.

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building—10th Floor, 601 Grant Street, Pittsburgh, PA 15219. (Telephone No. 412-644-2973).

Appendix C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LATROBE STEEL COMPANY and UNITED STEELWORKERS OF AMERICA, AFL-CIO	Case 6—CA—10333

Decision and Order

On March 8, 1979, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief, to which Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclu-

1. The Administrative Law Judge's finding that Respondent violated Sec. 8(a)(5) of the Act by preconditioning bargaining upon the presence of a court reporter is fully consistent with our recent decision in *Bartlett-Collins Company,* 237 NLRB No. 106 (1978). In passing, we note that impasse on this issue can preclude collective bargaining on any topic whatsoever. Thus, although other procedural matters such as the location and date and time of bargaining sessions may be agreed

sions of the Administrative Law Judge, to modify his remedy,[2] and to adopt his recommended Order.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the

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to by means other than through formal negotiation, insistence on the presence of a court reporter in effect reduces the options of the parties to the exchange of written communiques. We find such insistence at odds with the concept of meaningful bargaining and hence a violation of the duty to bargain in good faith imposed by the Act.

2. Having found that the strike which commenced August 1, 1977, was an unfair labor practice strike, the Administrative Law Judge found that the strikers were unfair labor practice strikers and he ordered that Respondent offer to each of them upon their unconditional application for reinstatement immediate and full reinstatement to his former position or, if such position no longer existed, to a substantially equivalent position, without prejudice to his seniority or other rights and benefits, dismissing, if necessary, persons hired on or after August 1, 1977. The Administrative Law Judge further recommended that Respondent make such strikers whole for any loss of pay or benefits suffered by reason of Respondent's failure or refusal to reinstate such striker within 5 days after his unconditional application for reinstatement by payment to him of a sum of money equal to that he would have earned as wages and other benefits from 5 days after his unconditional application for reinstatement until the date of reinstatement, less his net earnings during such period, said backpay to be computed in the manner prescribed by the Board in *F. W. Woolworth Company,* 90 NLRB 289 (1950), with interest thereon as prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977). We agree that this remedy is appropriate. In so doing, we note that the Board has

Appendix C.

Administrative Law Judge and hereby orders that the Respondent, Latrobe Steel Company, Latrobe, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. August 22, 1979

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

John C. Truesdale, Member

(SEAL)

NATIONAL LABOR
RELATIONS BOARD

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found the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. Accordingly, if Respondent herein has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work. *Newport News Shipbuilding and Dry Dock Company,* 236 NLRB No. 218 (1978). Member Jenkins, for the reasons set forth in his partial dissent in *Drug Package Company, Inc.,* 228 NLRB 108 (1977), would begin Respondent's backpay obligation from the date of each striker's unconditional offer to return to work.

Appendix C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LATROBE STEEL COMPANY Respondent and UNITED STEELWORKERS OF AMERICA, AFL-CIO Charging Party	Case No. 6-CA-10333

WILLIAM J. WOLVERTON, ESQ., and WILLIAM BEVAN III, ESQ. *for the* General Counsel.

JOSEPH G. ARMSTRONG, III, ESQ. (REED SMITH SHAW & MCCLAY), Pittsburgh, PA, for the Respondent.

DANIEL P. MCINTYRE, ESQ., Pittsburgh, PA, for the Charging Party.

Decision

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Pittsburgh, Pennsylvania, on March 14, 15, 16 and 17, 1978, upon a complaint issued on December 30, 1977, based on charges filed by the above-named Charging Party (herein "the Union") on June 21 and December 20, 1977 (all dates hereinafter, unless otherwise noted, are in 1977). The complaint alleges that the above-named Respondent violated Sections 8(a)(5) and (1) of the Act by (a) insisting on the presence of

a professional stenographer to make verbatim transcripts of collective-bargaining negotiations between the Union and Respondent for a new bargaining agreement; (b) insisting to the point of impasse on the exclusion of the Union from the right to initiate grievances on behalf of employees in the unit represented by the Union; (c) insisting to the point of impasse on Respondent's right to settle grievances with employees in the unit, without affording the Union the opportunity to be present: (d) insisting to the point of impasse that Local 1537, affiliated with the Union, (herein "the Local") be made a party to any new collective-bargaining agreement between the Respondent and the Union. It is also alleged that the strike of Respondent's employees in the unit which began on August 1, was caused and prolonged by Respondent's alleged unfair labor practices.

Respondent's answer denies the commission of the unfair labor practices alleged, and also denies that the strike of the employees was an unfair labor practice strike, but admits allegations of the complaint justifying the assertion of jurisdiction under current standards of the Board (Respondent, engaged at Latrobe, Pennsylvania, in the manufacture and distribution of steel products, during a recent annual period, received directly from outside the State of Pennsylvania goods and materials valued in excess of $50,000, and shipped directly to points outside the State of Pennsylvania, goods and materials valued in excess of $50,000), and to support a finding that the Union is a labor organization within the meaning of the Act.

Upon the entire record in this case, from observation of the witnesses and their demeanor, and after con-

sideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS AND CONCLUSIONS

A. The Facts

Background

Respondent, in 1937, recognized the Steel Workers Organizing Committee, the predecessor of the Union, as the bargaining representative of employees in its steel manufacturing and by-products coke plants, and entered into a collective-bargaining agreement with that labor organization. Since that time, the Respondent appears to have had continuous bargaining relations with the Union or its predecessors. However, none of the bargaining agreements between them have included the Local as a party to the agreement, although in recent years, at least, elected officers of the Local have participated on the bargaining committee which has negotiated those agreements, and together with other representatives of the Union have signed such contracts.

Representation: Appropriate Unit

It is agreed, and I find that the Union at all times material has been and is now the representative for the purposes of collective-bargaining, within the meaning of Section 9(a) of the National Labor Relations Act, as amended (herein "the Act") in the following unit which is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: "All production and maintenance employees employed by Respondent at its Latrobe, Pennsylvania, facility, excluding office clerical employees, mechanics, confiden-

tial employees, managerial employees and guards, professional employees and supervisors as defined in the Act."

1977-1978 NEGOTIATIONS

1. *Generally*

The most recent bargaining agreement between Respondent and the Union covering the above-stated unit, effective August 1, 1974, had a termination date of August 1, 1977. Representatives of Respondent and the Union met beginning June 7, on 27 occasions in negotiations prior to August 1, the date that employees in the unit went on strike, and on 20 occasions since then, up until the time of the hearing in this matter, in an effort to arrive at an agreement on a new bargaining contract. At these negotiations, Respondent's Director of Industrial Relations, Joseph W. Pischke, insisted upon a number of procedures which had not previously been required in bargaining for an agreement for this unit. Thus, at the outset, Pischke advised the Union negotiators that though they were accustomed to addressing him informally by his first name, in this bargaining they would be required to address him formally, as Mr. Pischke, or he would not respond. He also advised the Union that Respondent insisted on having the negotiations recorded by professional reporters, who were present at the initial meeting, and that no off-the-record discussions between the Union and Respondent would be permitted. The Union was also informed that Respondent intended to make the transcripts of the negotiations available to members of the bargaining unit during their nonwork time in Respondent's personnel office. With minor variation, noted hereafter, Pischke rigidly adhered to these requirements and limitations during the

negotiations. In addition, after a number of the negotiating sessions, Respondent issued letters to the employees entitled "Straight Talk," and referred to generally at the hearing as "Straight Talk letters," which the Respondent used to advise the employees of the availability of transcripts of the negotiations in the personnel office, and to comment on the negotiations generally and the conduct of the Union negotiators in particular. Respondent had not employed these tactics in previous negotiations.[1] The record indicates that these new procedures may have been adopted at the instance of the Timkin Company, which had acquired Respondent since the time of the previous negotiations (for the 1974-1977 contract) covering the appropriate unit here involved.

From the outset of the negotiations, the Union sought to obtain Respondent's agreement to the terms of the 1977 Basic Steel Agreement which had been negotiated with the major employers in the industry (Respondent traditionally had accepted the Basic Steel Agreement in the past), and to the continuation of the terms of the 1974 agreement between the Union and Respondent except as changed by the Basic Steel Agreement and by 21 "local proposals" made by the Union. On its part, Respondent submitted 22 proposals to change the terms of the 1974 bargaining contract (ac-

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1. Respondent's actions in making the transcripts available to the employees and in issuing Straight Talk letters to the employees were not alleged as violations of the Act in and of themselves, but litigation of these matters was permitted in order to show the context in which Respondent insisted on requiring a professional transcript of the negotiations, and to shed whatever light possible on Respondent's purpose.

cording to one witness these would result in about 400 changes in the contract), including demands that the Local be made a party to the contract, and to change the operation of the grievance procedure, as discussed hereinafter. Respondent dropped none of its proposals prior to August 1, the inception of the strike, although it made certain economic proposals prior to that date which the Union rejected.[2] It does not appear that Respondent has accepted any of the Union's proposals. On its part, the Union seems to have first reduced its demands after the inception of the strike, dropping its 21 local proposals, and agreeing to 2 issues raised by Respondent (which the latter characterized as an insignificant movement).[3]

2. *The Transcripts*

At the first bargaining session, Pischke introduced two professional reporters present, who he stated would on the Respondent's behalf record all of the negotiations. It was made clear that Respondent would negotiate only on that basis, and that no discussion of negotiable issues

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2. It appears that at all times during the negotiations, Respondent took the position that it would not "segment-bargain," that is, Respondent considered all of its proposals to be of equal value and not severable one from the other.

3. There is some confusion in the record as to when the Union dropped its 21 local issues. One witness for General Counsel, William Ehman, testified that the Union dropped its 21 local proposals in early July. Pischke asserted that the Union had withdrawn none of its proposals before August 18, but then testified that the 21 proposals were withdrawn on August 5. A publication issued by the local on October 10 indicates that the 21 issues were withdrawn on October 5.

would be permitted off-the-record.[4] As previously noted, the Union was informed that the transcripts would be made available to unit employees in Respondent's personnel office. In addition to making the transcripts available to the employees, Respondent also commented on the negotiations in the Straight Talk letters issued to employees after a number of the bargaining sessions, some of which were derogatory of the Union negotiators and their conduct of the negotiations. These actions caused the negotiators on both sides to be overly conscious of the record, led to confrontations between Respondent and the Union with respect to the making and use of these transcripts, and otherwise impeded the course of the negotiations. Thus there were frequent accusations during the negotiations that one side or the other was speaking "for the record," or acting in an abnormal way because of the record, or was speaking to an "invisible" audience which was not participating in the bargaining. Since the Union had no way of going "off-the-record," and had no control over the actions of the reporters, on one occasion a rather stormy confrontation occurred when the reporter continued to record comments of the Union negotiators remaining in the room after the session was concluded. The Union

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4. Pischke testified to two occasions after the beginning of the strike in which he had informal discussions with Union negotiators, initiated by the latter, with respect to facts which might assist in reaching agreement and ending the strike. The only other deviation from Respondent's fixed policy also occurred during the strike when Respondent met with the Union to discuss continuation of employee insurance coverage during the strike. No reporters were present at that meeting, which apparently did not involve bargaining issues.

negotiators also felt forced to restrain themselves in the manner of their proposals and the vigor of their arguments lest the transcripts or the Straight Talk letters be used by Respondent to make them appear in a bad light to the employees. On one occasion in which the Union negotiators accused management in profane terms of being insensitive to the welfare of the employees, this was reported to the employees in a Straight Talk letter in a manner that caused criticism of the Union negotiators. The Union further complained that the manner in which the negotiators were being reported to the employees caused misunderstandings that made it difficult for the Union to make or withdraw contract proposals.[5]

The record is persuasive, and I find that the Union objected to Respondent's insistence on a transcript of the negotiations taken by professional reporters, and to the uses made of the transcripts, as set forth above, from the outset of the negotiations and thereafter. To the extent that Pischke testified that the Union did not object to the "presence of the stenographer" at the first negotiations, on June 7, I do not credit his testimony. He elsewhere testified that there were long discussions concerning the transcripts at this opening session, although he asserts this related only to the use of the transcripts. He agrees that the Union objected to "the

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5. In one instance, the Union was inhibited in pursuing a proposal that Respondent provide certain benefits for employees suffering from alcoholism because, when Respondent denied that there was a problem, the Union negotiators were unwilling to discuss individuals "on the record."

use of a stenographer" at the second session, on June 13, and thereafter.[6]

Respondent adduced a number of reasons in support of its decision to insist upon a professional transcript of the negotiations. In essence, they are the following:

1. Respondent's parent company, The Timkin Company, has had similar transcripts made of its negotiations with the Union over several years. It appears, however, that in those cases there has been agreement by the Union to that procedure. There is no indication that Timkin has used the transcripts as Respondent has in the present case.

2. Although Respondent has never insisted on professional transcripts of negotiations for the unit involved here, it is asserted that such transcripts were made in two instances involving dealings between Respondent and the Union. In one case, in 1975, when Respondent was negotiating for the first time with the Union for a unit of office and technical employees, and the Union accused the Respondent of bargaining in bad faith, Respondent assertedly had difficulty in putting its notes together in response, and thereafter brought a professional stenographer into the negotiations. The Union does not seem to have objected. The transcripts were not used in communications with employees, so far as is shown. Though the Union withdrew its charges against Respondent in that case, it appears from

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6. At the June 13 session, one of the Union negotiators brought, and was permitted to use a tape recorder, ostensibly to check on the accuracy of the professional reporters. Shortly thereafter the Union negotiator announced that he was discontinuing use of the tape recorder, stating that he had demonstrated that there were a number of errors in the transcript.

Pischke's testimony that the parties have never come to agreement on a bargaining agreement for that unit.

In a second instance, Respondent brought professional reporters into meetings called for the purpose of bringing the pension plan covering unit employees into conformity with the Employee Retirement Income Security Act (ERISA). Though the Union objected, the meetings continued. As Pischke testified, the parties there, in fact, "were not negotiating" in the sense involved in the present proceeding.

3. Respondent indicates that both parties found the transcripts somewhat useful, Respondent using them at the end of each session to review the events of the day, and both sides finding it convenient on occasion to ask the reporter to repeat a comment made during the bargaining which had been missed. One Union negotiator who missed a session of the negotiations read the transcript of that day in Respondent's personnel office. There was also some indication that Respondent found this a convenient way to keep its parent company informed as to the negotiations.

4. Respondent argues that in the event of a charge that Respondent had engaged in bad faith bargaining in violation of the Act, such transcripts would be very useful in meeting the charge.

3. *The Contract Clauses*

In his complaint General Counsel attacks Respondent's alleged insistence to the point of impasse on three contract proposals during the negotiations involved here. The first of these proposals required that the Local be made a party to the contract, which had never been the prior practice. Respondent argued that this would

make the elected officials of the Local with whom Respondent dealt in the day-to-day administration of the contract more responsible. During discussion of this argument, Respondent indicated that it hoped thereby to restrain work stoppages in violation of the contract, but seems to have finally conceded that notwithstanding the proposed change, it would continue to deal with such occurrences in the future as it had in the past. The Union asserted that it could not agree to this proposal inasmuch as the Union's Constitution prohibited such a practice. On August 29, during intensive negotiations immediately prior to the strike on August 1, as Pischke testified, the Union informed Respondent that there was no chance of the parties reaching an agreement if the Respondent insisted on this item. However, Respondent did not withdraw its insistence on this proposal until February 6, 1978, at which time it also withdrew the proposals to change the grievance procedure discussed below.

The two remaining contract proposals by Respondent with which we are concerned here are part of Respondent's attempt to substantially rewrite and restructure the grievance procedure in the bargaining agreement. One result of this would withdraw from the Union the right to file grievances on its own initiative on behalf of employees or in protection of the rights of the Union as a whole. (Among other changes, Respondent's proposal would delete that part of the prior contract providing that the "grievance procedure may be utilized by the Union in processing grievances which allege a violation of the obligations of the Company to the Union as such." See GC Exh. 8, p. 53, marginal number 300) Thus, only grievances signed by individual aggrieved employees could be processed under the grievance procedure.

Respondent does not seem to dispute these findings, stating in its brief that "one of [Respondent's] requests eliminated the Union from filing a grievance under the grievance procedure of the contract," but asserting that "the Union was not excluded from representing employees in the subsequent steps of the Grievance Procedure." (Brief, p. 29)

The General Counsel further contends that Respondent's proposed grievance procedure provided that "the aggrieved employee could settle his grievance or complaint with or without the Union's presence 'as the employee may elect,' " "in the *first two steps* of the grievance procedure." (Brief, p. 12, emphasis added). At the same time, General Counsel admits that under the grievance procedure provisions of the 1974-1977 contract which the Union wished continued, "the aggrieved employee could seek to settle the grievance with or without the Union present, at the employee's own election," "during the *first* step of the grievance procedure." (Brief, p. 12, emphasis in the original) Thus the issue really concerns the changes proposed by Respondent in step 2 of the grievance procedure. Paragraph 1 of Step 2, as proposed by Respondent is set forth below (regular type is the language of the prior agreement; bracketed matter is language of the prior agreement deleted by Respondent's proposal; italicized material is new matter inserted in Respondent's proposal):

Step 2

1. A grievance, to be considered further must be filed in writing . . . [promptly] *within five calendar days* after the conclusion of the Step 1 discussions. It shall be dated and signed by [the grievance committeeman or] the employee (or other

employees affected) *and a member of the grievance committee* and should include such information and facts as may be of aid to the Company [and the Union] in arriving at a fair, prompt and informed decision. *A step 2 meeting will be scheduled by the Company within 10 calendar days following receipt of appeal to step 2. The meeting will be between the employee, a member of the grievance committee, as the employee may elect, the General Foreman or his designated representative.* The answer to the grievance shall be given *by the General Foreman or his designated representative* [within 72 hours from the time of presentation. . . . Such answer . . . shall be signed and delivered to the grievance committeeman] *within five calendar days following the Step 2 meeting and shall be signed and delivered to the employee and a member of the grievance committee.*

B. Analysis and Conclusions

1. *Respondent's insistence on verbatim transcripts*

From the outset of negotiations for a new contract, Respondent made clear that it would not bargain with the Union unless all of the bargaining discussions were recorded by professional reporters. Though the Union protested Respondent's demand and continued to object to this procedure and the uses made of the transcripts of bargaining by Respondent, it nevertheless continued to bargain with the Respondent. During the negotiations Respondent not only took particular effort to make the transcripts available to the unit employees, but used them as a basis for denigrating the Union negotiators and their conduct of the negotiations. By this conduct Respondent clearly inhibited free and full discussion of

bargainable issues and impeded the course of bargaining for a new collective-bargaining agreement, contrary to the purposes and politics of the Act.

General Counsel called as a witness an attorney of wide experience in labor relations and collective bargaining who testified to the effect that the use of professional reporters to record collective-bargaining negotiations is unusual and is considered generally to impede and obstruct such bargaining. In his brief, General Counsel cites various experts in the field as having written to this effect. Respondent, on its part, at the hearing called as a witness an attorney for Respondent's parent, The Timkin Company, who testified that his experience has been generally to the contrary. However, our experience, and I believe the weight of authority of experts in the field of labor relations tend to support the witness called by General Counsel rather than Respondent's witness on the issue. See also *Bartlett-Collins Company,* 237 NLRB No. 106, at pp. 9-10 of the slip sheets (Aug. 23, 1978).

Respondent's reasons for insisting upon such transcripts, noted hereinabove, amount generally to claims of personal preference and convenience. Respondent also places particular stress on the usefulness of such transcripts in the event of unfair labor practice charges, citing *N.L.R.B. v. Southern Transport, Inc.,* 355 F.2d 1978. These reasons cannot prevail, however, over the overwhelming weight of evidence of those who know this field that insistence upon such transcripts, over the objections of other parties to the negotiations, tends to stulify bargaining and obstruct the policies and purposes of the Act to foster and encourage free collective bargaining. Experience has shown that careful notetaking by the negotiating team does serve well all of the

needs of the parties, including defenses to unfair labor practice charges. Indeed, insistence on introducing strange reporters in the negotiations tends to create tension and suspicion, as in the instant case, which leads to the very litigation that Respondent says it seeks to avoid. Insistence upon unilaterally imposed conditions is not conducive to peaceful settlement of difficult labor relations problems.

Since the close of the hearing in this matter, the Board has decided, in *Bartlett-Collins, supra,* that insistence by one party to bargaining negotiations upon verbatim transcripts of the negotiations taken by professional reporters as a condition precedent to the bargaining over the objections of other parties, constitutes unlawful insistence upon a non-mandatory bargaining issue in violation of Sections 8(a)(5) and (1) of the Act. Respondent's counsel, by letter supplementing his brief, contends that decision is not applicable to this case because (1) "the impasse and ensuing strike [in this matter] was caused by the intransigent position taken and maintained by the Union throughout the bargaining negotiations," and (2) "in all equity and judicial fairness a retroactive or *ex post facto* application of the holding in the *Bartlett* case would not be justified in these proceeding," citing *Drug Package, Inc.,* 570 F.2d 1340.

I find, however, contrary to Respondent, that the impasse with respect to the taking of the transcripts of negotiations took place at the outset of the negotiations when Respondent insisted that the negotiations could not proceed except upon that condition, and the Union objected and continued to maintain its opposition to such procedure. The fact that the Union nevertheless con-

tinued to bargain does not change the result. To hold that the Union was compelled to break off bargaining in order to make its point would be destructive of the bargaining process and run counter to the purposes of the Act. Moreover, even if it were considered that impasse occurred as to this issue when the strike began on August 1, 1977, I find that Respondent's insistence on the taking of verbatim transcripts of the negotiations contributed substantially to that impasse, as discussed further hereinafter.

N.L.R.B. v. Drug Package, supra, considered whether the Board's recent policy of issuing bargaining orders retroactive in effect, rather than merely prospective, where a refusal to bargain was found, was appropriate in that case. The Court, after holding that the Board was in error in finding a refusal to bargain in the first instance, held the Board's Order inappropriate there, through recognizing the authority of the Board to announce new rules in adjudicatory proceedings such as the present case. In this case, where the insistence on verbatim transcripts, and the uses made of them are shown to have impeded and obstructed collective bargaining contrary to the basic purposes of the Act, a finding that Respondent thereby violated the Act is particularly appropriate.

For the reasons stated, I find that by insisting to impasse upon professional reporters to make verbatim transcripts of the bargaining negotiations, Respondent violated Sections 8(a)(5) and (1) of the Act.

2. *Insistence on the Local as a party to the contract*

Respondent, from the baginning of the negotiations until February 6, 1978 (about 7 months after the incep-

tion of the strike) insisted that the Local be included as a party to the collective-bargaining agreement. Respondent's position was that this would make the Local, some of whose officers participated in the bargaining negotiations, more responsible in the administration of the bargaining agreement.

However, it is admitted that at all times material the Union was the designated or selected representative of all the employees in the appropriate unit, and "by virtue of Section 9(a) of the Act has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining." (See par. 7 of the complaint and Respondent's answer) For approximately 40 years Respondent has bargained and signed bargaining agreements with the Union or its predecessors as the representative of such employees. It appears that during some part of that period officers of the Local participated in that process as agents or representatives of the Union for that purpose. On this record it cannot be said that the unit employees desired the Local to participate in the bargaining process on any other basis. Indeed, during the negotiations, the Union opposed this proposal of Respondent on the grounds that it was not only contrary to the settled policy of the Union, but was also contrary to the Union's constitution. In such case it is to be assumed that the unit employees had assented to the Union's practice that the Local not be made a party to the contract.

In these circumstances, the Union being the exclusive bargaining representative of the unit employees within the meaning of the Act, Respondent was not justified in insisting to the point of impasse, as it did, that the Union relinquish that status and agree that the Local

be a co-representative of the employees for the purposes of collective bargaining. As the Supreme Court held in *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, such proposals to change the representative status of the labor organization designated or selected by unit employees are not proposals which deal with "wages, hours and other terms and conditions of employment," and thus are non-mandatory bargaining issues which cannot be insisted upon in negotiations to the point of impasse.

For the reasons set forth, Respondent, by insisting to the point of impasse that as a condition to agreement upon a new contract that the Local be made a party to the contract, violated Sections 8(a)(5) and (1) of the Act.

3. *Insistence upon changes in the grievance procedure*

a. *Waiver of the Union's right to be present at the adjustment of grievances*

Section 9(a) of the Act provides, insofar as pertinent to this issue, that employees shall have the right "to present grievances to their employer and have such grievances adjusted, without intervention of the bargaining representative," provided that "the bargaining representative has been given opportunity to be present at such adjustment."

General Counsel contends that Respondent insisted as a condition to entering into a new bargaining agreement with the Union that the latter agree that in the first two steps of the grievance procedure that "the aggrieved employee could settle his grievance or complaint with or without the Union's presence, 'as the employee

may elect.' " (GC brief, p. 12) This, indeed, seems to be the effect of Respondent's proposal as to the first step of the grievance procedure. However, Respondent's proposal to this extent was the same as the grievance procedure in prior contract between the Union and Respondent which the Union asserted it was willing to accept in the new agreement (though without other changes sought by Respondent). This being so, it can hardly be said that Respondent was insisting upon an impermissible change in the first step of the grievance procedure to the point of impasse.

However, Respondent's proposal for the second step of the grievance procedure presents a more difficult problem. In this step Respondent proposed, and insisted until long after the inception of the strike, that the step 2 meeting in the grievance procedure "will be between the employee, a member of the grievance committee, *as the employee may elect,* [and] the General Foreman or his designated representative." (emphasis added) This was a substantial change from the prior agreement, and was never agreed to. But Respondent's proposal further provided that Respondent's answer to the step 2 grievance presentation would be given in writing within 5 days after the meeting, with copies of such answer delivered to the employee and a member of the Union's grievance committee. Thus it is far from clear that Respondent's proposal envisioned a step 2 meeting at which the employees' grievances would be adjusted without affording the Union an opportunity to be present at the adjustment. Rather it appears that it was anticipated that the employees' grievances would be adjusted—if they were adjusted—by written communication after the meeting, with a copy given to the Union and the employee. In these circumstances, I find that Respondent's proposal,

on its face, did not exclude the Union from an opportunity to be present at the adjustment of the employees' grievances at step 2 of the grievance procedure. It may be that such would be the practice under such procedure, but I cannot here pass upon that.

For the reasons stated, I will recommend that the allegations of the complaint that Respondent violated the Act by insisting to the point of impasse on the right to settle grievances with unit employees without affording the Union an opportunity to be present be dismissed.

b. *Waiver of the Union's right to file grievance*

Under the prior agreement between the Union and Respondent, the Union had the right to file grievances on behalf of individual employees and groups of employees, and also to protect the rights of the Union under the bargaining agreement. Respondent's proposals with which we are concerned here withdrew the Union's right to file grievances on its own initiative and required that all such grievances be signed by individual employees. In its brief, Respondent argues that though its proposals would eliminate the Union from filing grievances, the Union was not excluded from representing employees at later stages of the grievance procedure, and, further, that "it was the intrasigence of the Union" that eliminated any prospect of reaching an agreement," (p 31) "so it is apparent that this particular proposal of the company was not the cause of the impasse." (p. 30)

The right of the Union, however, to represent the employees in the unit, both individually and collectively, at all stages of the grievance procedure, including the right to file grievances and process them, and to administer the collective-bargaining agreement, is a stat-

utory right which Respondent may not insist to the point of impasse that the Union waive. The proposal that only grievances signed by individual employees could be considered under the contract was not a matter included within the term "wages, hours and other conditions of employment" that Respondent was privileged to make a condition precedent to agreement, as Respondent did here. See *I.U.M.S.W.A., AFL-CIO v. N.L.R.B.*, 320 F2d 615.

I find, on the record as a whole, and as discussed hereinbelow, that Respondent, by insisting to impasse upon the elimination of the Union from filing grievances under the contract and upon the requirement that all grievances be signed by individual employees, engaged in conduct violating Sections 8(a)(5) and (1) of the Act.

4. *The impasse issue; nature of the strike*

Respondent does not dispute that the bargaining negotiations had reached an impasse by the time that the Union went on strike on August 1, 1977, or that Respondent continued to insist upon all of its proposals discussed above at that time and for a considerable period thereafter, but argues, nevertheless, that it cannot be held responsible for the impasse which occurred since the Union also adamantly refused to give up any of its demands prior to the strike, and, indeed, did not come to terms with Respondent even when Respondent dropped its proposals on February 6, 1978, for changes in the grievance procedure and that the Local be made a party to the contract. Respondent misses the point. There is no showing that the Union was engaged in other than proper bargaining, or that it was not privileged to

maintain the positions which it held. On the other hand, as has been shown, Respondent was not privileged to insist to impasse upon positions which have been discussed. In effect, Respondent argues that there would have been no agreement even if it had not taken the adament positions with which we are here concerned. The problem is that we have no way of testing this argument because Respondent did not withdraw from these impermissible positions prior to impasse. It is impossible to know as a matter of hindsight what the Union might have done, prior to impasse, if the Respondent had not exacerbated the negotiations with unilaterally imposed conditions (such as the insistence upon verbatim transcripts and the uses made of them), or had dropped the proposals discussed above prior to the strike. As an example: the record shows that there was no chance whatsoever of an agreement so long as Respondent insisted on making the Local a party to the contract. Respondent was informed of this, but not only did not drop this proposal, but made it clear that its agreement to anything was contingent on the Union's agreement to all of Respondent's proposals.[7]

On the record as a whole, I find that Respondent's adamant position with respect to making the Local a

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7. The fact that the Union still did not come to agreement with Respondent even after Respondent dropped its impermissible proposals during the strike has been carefully noted but does not change the conclusions made above. The record is not clear as to the details of the negotiations. That the Union continued adamant on its demands, even after Respondent dropped its most objectionable proposals may well be due to the state of the bargain at that time. It is not surprising that the Union position might have hardened after 7 months of strike.

party to the contract, its insistence upon a verbatim transcript of the negotiations by professional reporters, and its insistence on excluding the Union from filing grievances on its own initiative under the contract contributed substantially to the impasse which resulted in the strike and were causes of the impasse which occurred and of the strike which resulted. I therefore find, that the strike was an unfair labor strike, caused and prolonged in substantial part by Respondent's unfair labor practices.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein the Union has been and continues to be the exclusive representative of Respondent's employees in the appropriate bargaining unit set forth immediately below for the purposes of collective bargaining within the meaning of Sections 9(a) and (b) of the Act.

4. All production and maintenance employees employed by Respondent at its Latrobe, Pennsylvania facility, excluding office clerical employees, mechanics, confidential employees, managerial employees and guards, professional employees and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. Respondent, by insisting to impasse on the presence of professional reporters to make verbatim transcripts of bargaining negotiations as a condition of

bargaining, and by insisting to impasse, as a condition of agreement to a bargaining contract, upon making the Local a party to the contract, and that all grievances filed under the contract be signed by individual employees in the unit, has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(5) and (1) of the Act, which unfair labor practices affect commerce within the meaning of Sections 2(6) and (1) of the Act.

6. The strike of the unit employees which began on August 1, 1977, was caused and has been prolonged by Respondent's unfair labor practices.

THE REMEDY

It having been found that Respondent has engaged in and is engaging in unfair labor practices in violation of Sections 8(a)(5) and (1) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has engaged in unfair labor practices in violation of the Act by insisting to impasse as a condition of bargaining upon verbatim transcripts of the negotiations taken by professional reporters, and by insisting to impasse as a condition to agreement to a collective-bargaining contract upon making Local 1537, affiliated with the Union, a party to the contract, and that all grievances filed under the contract be signed by individual employees, I shall recommend that Respondent be ordered to cease and desist from engaging in such conduct, and, upon request, bargain collectively in good faith with United Steelworkers of America, AFL-CIO, and its designated agents at times and places mutually convenient concerning wages, rates

of pay, hours of employment, and other terms and conditions of employment.

Having found that the strikers who went on strike on August 1, 1977, and thereafter, are unfair labor practice strikers, it will be recommended that Respondent be ordered to offer each of them, upon his unconditional application for reinstatement, immediate and full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and benefits, dismissing, if necessary, persons hired on or after August 1, 1977. Respondent shall make such strikers whole for any loss of pay or benefits suffered by reason of Respondent's failure or refusal to reinstate such striker within 5 days after his unconditional application for reinstatement by payment to him of a sum of money equal to that he would have earned as wages and other benefits from 5 days after his unconditional application for reinstatement until the date of his reinstatement, less his net earnings during such period, and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289, and *Florida Steel Corporation*, 231 NLRB No. 117. See generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[8]

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8. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Appendix C.

ORDER

Latrobe Steel Company, Respondent herein, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interfering with the efforts of United Steelworkers of America, AFL-CIO, herein the Union, to bargain on behalf of the employees in the unit described below by insisting to impasse upon any of the following:

(1) the presence of professional reporters to make a verbatim stenographic record of negotiations as a condition to negotiations with the Union.

(2) making Local 1537, affiliated with the Union, a party to the contract, as a condition to agreement upon a bargaining contract.

(3) that the Union be excluded from filing grievances, or that all grievances be signed by individual employees.

(b) In any like or related manner interfering with the efforts of the Union to bargain collectively on behalf of the employees in the unit described below:

The appropriate unit is: All production and maintenance employees employed by Respondent at its Latrobe, Pennsylvania, facility, excluding office clerical employees, mechanics, confidential employees, managerial employees and guards, professional employees and supervisors as defined in the National Labor Relations Act as amended.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the Union and its designated agents at mutually convenient times and places with respect to wages, rates of pay, hours, and other terms and conditions of employment, and if agreement is reached, embody it in a signed contract.

(b) Offer full reinstatement to all strikers who went out on strike on August 1, 1977, or thereafter joined such strike, within 5 days after each such striker makes an unconditional offer to return to work, and make each striker whole for any loss of pay or benefits suffered by reason of Respondent's failure or refusal to reinstate such striker within the time limit required in the manner set forth in the portion of this Decision entitled "The Remedy."

(c) Post at its facility at Latrobe, Pennsylvania, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by an authorized representative of Respondent, shall be posted by it immediately upon receipt

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9. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

thereof, and be maintained by it for 60 consecutive days thereafter, inconspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is dismissed as to any alleged violation of the Act not found hereinabove in this Decision.

Dated, Washington, D.C., March 8, 1979.

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Sidney J. Barban
Administrative Law Judge

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No. 80-1824

In the Supreme Court of the United States

OCTOBER TERM, 1980

LATROBE STEEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner's production and maintenance employees are represented by the United Steelworkers of America, AFL-CIO. When petitioner and the Union met to negotiate a new collective bargaining agreement in 1977, petitioner introduced two professional stenographers and advised the Union that the stenographers would record the negotiations and that no off-the-record discussions would be permitted (Pet. App. 36a-37a, 39a-40a). The Union objected to the procedure, but petitioner refused to yield and the Union proceeded with negotiations under protest. The Union continued to protest the use of the stenographers throughout the negotiations (Pet. App. 41a-42a, 46a). The Board, relying on its decision in *Bartlett-Collins Co.*, 237 N.L.R.B. 770 (1978), enforced, 639 F. 2d 652 (10th Cir. 1981), petition for cert. pending, No. 80-1662 (filed Apr. 1, 1981), affirmed the

finding of an administrative law judge that petitioner "violated Sec. 8(a)(5) of the Act by preconditioning bargaining upon the presence of a court reporter * * *" (Pet. App. 31a n.1).

2. The court of appeals upheld the Board's conclusion that petitioner had violated the Act by insisting on the presence of stenographers as a precondition to bargaining (Pet. App. 15a-16a).[1] The court recognized (Pet. App. 6a) that in *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), this Court "held that the duty to bargain in good faith is limited to the subjects of wages, hours and terms and conditions of employment" and that "[o]n matters concerning those subjects 'neither party is legally obligated to yield,' " while on "the so-called non-mandatory matters, 'each party is free to bargain or not to bargain, and to agree or not to agree.' " The court, however, "perceive[d] no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees" (Pet. App. 9a). It added (Pet. App. 9a-10a) that "[i]t would be contrary to the policy of the Act, which mandates negotiation over the substantive provisions of the employer-employee relationship, to permit negotiations to break down over this preliminary procedural issue."

3. The issue raised in the petition—whether a party to collective bargaining negotiations may insist to impasse

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[1] The court of appeals was unanimous in its affirmance of the Board's disposition of the issue raised in the petition. Judge Weis, however, dissented (Pet. App. 22a-25a) from the majority's refusal (Pet. App. 16a-21a) to enforce the Board's findings that petitioner unlawfully had insisted to impasse that the Union's local affiliate be made a signatory to the agreement and that the Union be foreclosed from filing grievances on its own initiative, and its finding of a causal connection between petitioner's insistence on the presence of the stenographers and a strike by bargaining unit employees. No issue concerning these findings is raised before this Court.

upon the use of a stenographer to make a transcript of collective bargaining negotiations—is the same as that presented in *Bartlett-Collins Co.* v. *NLRB*, petition for cert. pending, No. 80-1662 (filed Apr. 1, 1981). Petitioner's assertions (Pet. 11-19) that the Board's decision in this case conflicts with decisions of this Court and those of other courts of appeals are answered, for the most part, in the Board's brief in opposition to the petition in *Bartlett-Collins*.[2]

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[2]A copy of the brief in opposition filed in *Bartlett-Collins* has been served on counsel for petitioner.

The petitioner in *Bartlett-Collins* relied primarily on *NLRB* v. *Southern Transport, Inc.*, 355 F. 2d 978 (8th Cir. 1966), which, as we explained in our brief in opposition in *Bartlett-Collins* (at 8-9 & n.2), is distinguishable on the ground that the court in that case focused on the question whether the demand for a court reporter was made in good faith, and never considered whether the matter constituted a mandatory subject of bargaining. The additional cases relied on by petitioner here (Pet. 7, 17-19) are distinguishable on the same ground. Thus, in *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 139 (1st Cir.), cert. denied, 346 U.S. 887 (1953), the court of appeals stated that it was "not inclined to agree with the Board that the Company's insistence, over the Union's strenuous objection, on having a stenotypist present at all the bargaining meetings to take down a verbatim transcript of the proceedings was evidence of the Company's bad faith," without even adverting to the question whether stenographic transcription was a mandatory subject of bargaining. Similarly, in *Mid-America Transportation Co.* v. *NLRB*, 325 F. 2d 87, 90 (1963), the Seventh Circuit affirmed the Board's finding of a violation of the duty to bargain in good faith on the ground that the company's "insistence that bargaining take place only in Tennessee * * * was unreasonable and was not advanced in good faith." Finally, in *NLRB* v. *Exchange Parts Co.*, 339 F. 2d 829 (5th Cir. 1965), the court upheld the Board's finding that the company had violated the duty to bargain by failing to meet and confer with the union at reasonable times and intervals concerning negotiation of a contract ("the inherent difficulty arising when a lawyer in full practice represents the employer in bargaining sessions, does not exempt the employer from the normal requirements that nothing be done *for the purpose of stifling an opportunity for discussion*"; 339 F. 2d at 832 (emphasis added)).

That petitioner's insistence on the use of stenographers to transcribe the negotiating sessions may have derived from its good faith belief that such a practice promotes the objectives of collective bargaining (Pet. 6-7)[3] is immaterial, since once an issue is denominated a nonmandatory subject of bargaining, a party may not bargain to impasse on it even in good faith. As this Court explained in *NLRB* v. *Wooster Div. of Borg-Warner Corp., supra,* 356 U.S. at 349:

> "[G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.

See also *NLRB* v. *Katz,* 369 U.S. 736, 742-743 (1962).[4]

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[3]There is a widely-held view contrary to petitioner's, however. In *Bartlett-Collins, supra,* 237 N.L.R.B. at 773 n.9, the Board noted the view of "many experts in the field of labor relations * * * that the presence of a reporter during contract negotiations has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." Similarly, as the Tenth Circuit explained in enforcing the Board's order in *Bartlett-Collins* (639 F. 2d at 656; citations omitted): "It may cause parties to talk for the record rather than to advance toward an agreement. The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiations. When a court reporter is demanded over objection, bargaining is likely to begin on a discordant note. The request may give notice that one party lacks confidence in the collective-bargaining process, anticipating litigation rather than agreement. In sum, the process of 'informed persuasion' may be supplanted by the concern for being a careful litigant."

[4]Relying on the court of appeals' dictum (Pet. App. 13a) that "it is equally violative of the Act to insist on the absence of stenographers as to insist that stenographers be present," petitioner asserts (Pet. 17 n.9) that the Board's rule creates a " 'cat and mouse' game * * * so that each party will be able to reject some procedural matter proposed by the other party." As the court noted (Pet. App. 13a n.7), however, if a

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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situation arose in which both parties were found to be frustrating bargaining by insisting to impasse on conflicting positions concerning a nonmandatory subject of bargaining, both would be guilty of engaging in unfair labor practices and the Board would be required to devise an appropriate remedy. The court added (Pet. App. 13a), however, that such is not this case. Here, the Union negotiated in the presence of the stenographer and then filed an unfair labor practice charge. Moreover, as the Board noted (Pet. App. 31a n.1), insistence on a stenographic transcript entails a unique frustration of bargaining negotiations because "impasse on this issue can preclude collective bargaining on any topic whatsoever."

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PETITIONER'S REPLY TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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PETITIONER'S REPLY TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

In its petition for writ of certiorari Latrobe Steel Company presented the following reasons for granting the writ:

1. the decisions below are contrary to Congress' intent in enacting Section 8(d) of the NLRA, 29 U.S.C. §158(d), because they allow the National Labor Relations Board to dictate the procedures which a party to collective bargaining may employ, without regard to the facts and circumstances of the particular negotiations;

2. under this Court's decisions Section 8(d) of the NLRA is to be interpreted so as to encourage collective bargaining, rather than interpreted in the strict and literal manner employed by the Board and Third Circuit in this case;

3. the Board had previously held numerous times that the presence of a professional stenographer at negotiations is a mandatory subject of bargaining under Section 8(d) of the NLRA and those contemporaneous decisions which support Petitioner are entitled to more deference by the courts than the Board's decision in this case;

4. the Third Circuit's decision in this case conflicts with decisions of other courts of appeals, including decisions of the Eighth, First, Fifth and Seventh Circuits;

5. the decisions below are contrary to the law, including Section 8(c) of the NLRA, 29 U.S.C. §158(c), because they prevent the Company from communicating to the employees and other persons a verbatim record of what was said at bargaining

by preventing the Company from insisting upon making the record in the first instance.

United Steelworkers of America has not filed any response to the points made in the Company's Petition. The National Labor Relations Board has filed a Memorandum in Opposition, but that Memorandum does not respond to points 1, 2, 3 and 5 listed above. The Board's Memorandum simply incorporates a Brief in Opposition filed by the Board in another case pending before the Court on petition for writ of certiorari, *Bartlett-Collins Co. v. N.L.R.B.*, No. 80-1662 (petition filed April 1, 1981). The petition for writ of certiorari filed in *Bartlett-Collins, supra,* presents a narrower question for review than the petition filed by the Company in the instant case. Moreover, the petition filed in *Bartlett-Collins, supra,* presented only one issue as reason for granting the writ—that the decision of the Tenth Circuit in that case is in direct conflict with a decision of the Eighth Circuit in *N.L.R.B. v. Southern Transport, Inc.*, 355 F.2d 978 (8th Cir. 1966). Thus, the question presented and issues raised in Latrobe Steel Company's petition in this case are not necessarily presented or raised by the petitioner in *Bartlett-Collins, supra.* Accordingly, even if a writ of certiorari were denied in *Bartlett-Collins, supra,* it would not dispose of the question presented and issues raised by the petition in the instant case.

As to the existence of a conflict among the circuit courts raised in the *Bartlett-Collins* petition (which was also raised by the Company in this case, along with four other issues listed above), the Board's response is incorrect. The Board contends (Mem. in Opp. at 3 n. 2) that the Eighth Circuit's decision in *Southern Transport v. N.L.R.B., supra,* is not in conflict with either the Third

Circuit's decision in this case or the Tenth Circuit's decision in *Bartlett-Collins* purportedly because the Eighth Circuit never considered whether using a professional stenographer to make a record of negotiations constituted a mandatory subject of bargaining. The Board quoted in the Brief in Opposition (at 8) filed in *Bartlett-Collins* part of the Eighth Circuit's decision in *Southern Transport, supra,* attempting to show that the Eighth Circuit only considered whether the employer had acted in good faith. In the next sentence of the opinion following the text quoted by the Board, however, the Eighth Circuit clearly identified the "primary issue" in the case as "the legitimacy of the Respondent's request and insistence, over the objection of the Union, on the presence of a qualified court reporter." *Southern Transport, Inc. v. N.L.R.B., supra,* 355 F.2d at 982. The Eighth Circuit then considered whether the request to use the professional stenographer was not legitimate either because the matter was a non-mandatory subject of bargaining and, therefore, per se unlawful, or because the matter was a mandatory subject of bargaining, and, therefore, unlawful only if the employer had not acted in good faith. 355 F.2d at 982-986.

The Eighth Circuit rejected the Board minority view that the professional stenographer matter was a non-mandatory subject of bargaining, reasoning that Congress would have to amend the NLRA before that result could be obtained. 355 F.2d at 984. Concluding that the request to use the professional stenographer was a mandatory subject of bargaining, the Eighth Circuit held that the employer in *Southern Transport* had not violated the NLRA because he had acted in good faith. Thus, contrary to the Board's assertion, the Eighth Circuit in *Southern Transport* clearly addressed

the question of whether the professional stenographer matter is a mandatory subject of bargaining. The Eighth Circuit's conclusion that the stenographer issue is a mandatory subject is therefore in direct conflict with the decision of the Third Circuit in the instant case, as well as with the Tenth Circuit's decision in *Bartlett-Collins*. The decisions by the First, Fifth and Seventh Circuits cited in the Company's Petition at 18-19 are also in conflict with the decisions of the Third and Tenth Circuits.

In the Brief in Opposition filed for the Board in *Bartlett-Collins*, Respondent freely admits that prior Board decisions had held that, in the absence of bad faith, a party could lawfully demand that negotiations be transcribed by a professional stenographer. The Board attempts to escape the effect of this Court's decisions which require that more deference be given to the contemporaneous administrative interpretation of a statute (which are discussed at pages 15-16 of Latrobe's Petition), by arguing that its earlier interpretation was rendered prior to the decision in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), and that the change in the Board position on this issue was justified by that decision. However, this assertion is belied by the fact that for almost twenty years after the *Borg-Warner* decision, the Board continued to apply the good faith standard in assessing the legality of a party's insistence upon the making of a verbatim record of negotiations or grievance discussions.[1]

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1. *E.g., American Ship Building*, 226 N.L.R.B. 788, *enforced*, 99 L.R.R.M. 2632 (D.C. Cir. 1978); *Southern Transport, Inc.*, 150 N.L.R.B. 305 (1964), *enforcement denied*, 355 F.2d 978 (8th Cir. 1966); *B. F. Diamond Construction Co.*, 163 N.L.R.B. 161 (1967), *enforced*, 401 F.2d 910 (5th Cir. 1969). *See also* the numerous other decisions cited in Pet. at 14-15 n. 7.

Moreover, the Board's attempt to find support for the recent change in position on this issue in the opinions of various industrial relations "experts" is equally unpersuasive. Many of the works cited by the Board in its memorandum in *Bartlett-Collins* were considered by the Board when it formulated and applied its original position that the presence of a stenographer was a mandatory subject of bargaining. *See, e.g., St. Louis Typographical Union,* 149 N.L.R.B. 750, 752 (1963), wherein the Board noted that "it is clear that respected authorities differ in their opinion of the effect of making a stenographic transcript in collective bargaining sessions." Also, even if some commentators do not agree with the practice of using a stenographer during negotiations, that certainly is not a sufficient basis for the Board to change the substantive law by dictating to employers and unions the procedural aspects of bargaining, in clear contravention of the Congressional intent to permit parties to establish their own procedures through good faith bargaining. *See* Pet. at 8-11.

Finally, the interpretation of the Act asserted by the Board does not represent a reasonable and principled application of the Act, and therefore is not entitled to any special deference herein. *See Ford Motor Co. v. NLRB,* 441 U.S. 488, 495-97 (1979). In fact, the Board even admits that under the Third Circuit's decision, both parties to bargaining would commit an unfair labor practice by insisting to impasse on conflicting positions concerning a non-mandatory subject of bargaining such as procedural matters. (Mem. in Opp. at 4-5 n. 4). Under the Board's approach, however, the good faith standard of bargaining is inapplicable to such procedural matters because, in the Board's view, they are non-mandatory subjects of bargaining. There is, there-

fore, no way to break such an impasse under the Board's new approach. It is therefore difficult to understand—and the Board never explains—how that "cat and mouse" game will be avoided wherein a party to collective bargaining can essentially forestall bargaining on substantive issues by rejecting procedural matters (such as the time and place of bargaining, making of a verbatim transcript, length of negotiating session, etc.) raised by the other party.

In short, the position taken by the Board in its memorandum in opposition to Latrobe's petition for writ of certiorari only superficially addresses the broad and important issues raised by Latrobe's petition, and does not even respond to most of the issues raised by Petitioner, such as the fact that the Third Circuit's decision prohibits it from communicating an accurate report of the progress of negotiations to its employees, in violation of Section 8(c) of the Act. Pet. at 19-23. The issues raised in this case are not so simplistic as the Board apparently would have this Court believe. The position of the Board and Third Circuit represents an improper interference with the process of collective bargaining beyond that contemplated by Congress, and conflicts with numerous decisions of this Court, the Board, and of other circuit courts. A writ of certiorari should issue to review and resolve these issues.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, Latrobe respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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